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ISSN 1548-6605 (Print) ISSN 1930-2061 (Online)

US-CHINA LAW REVIEW

VOLUME 11, NUMBER 3, MARCH 2014

David Publishing Company
www.davidpublishing.com

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VOLUME 11, NUMBER 3, MARCH 2014 (SERIAL NUMBER 99)

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Publication Information:
US-China Law Review is published bimonthly in hard copy (ISSN 1548-6605) and online (ISSN 1930-2061) by David Publishing Company located at 16710 East Johnson Drive, City of Industry, CA 91745, USA

Aims and Scope:
US-China Law Review, a bimonthly professional academic journal, commits itself to promoting the academic communication about laws of China and other countries, covers all sorts of researches on legal history, law rules, legal culture, legal theories, legal systems, questions, debate and discussion about law from the experts and scholars all over the world.

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Tel: 1-323-984-7526 1-323-410-1082
Fax: 1-323-984-7374 1-323-908-0457
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Abstracted/Indexed in:
Google Scholar
HeinOnline, W.S.Hein, USA
Database of EBSCO, Massachusetts, USA
Chinese Database of CEPS, Airiti Inc. & OCLC
Chinese Scientific Journals Database, VIP Corporation, Chongqing, P.R.China
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Subscription Information:
Print $450, Online $320, Print and Online $600 (per year)
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US-CHINA LAW REVIEW

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ARTICLES

THE EFFECTS OF CRIMINAL LAW ON ARBITRATION

Çetin Arslan[*]

While arbitration is essentially a private law institution, its various aspects have ties to criminal law. Therefore, it is highly important to examine particular circumstances that criminal law norms may have on the arbitration procedures, or arbitral awards, as well as the consequences of these affects. In this respect, the implementation of the rules of Criminal Procedure, in particular rules regarding inadmissible evidence—in the arbitration proceedings; direct or indirect influence of criminal court judgments on arbitration proceedings; or criminal responsibility of arbitrators, are some of the important issues that deserve to be examined. In this study, these issues will be evaluated with respect to the theory and the practice of Turkish Law.

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INTRODUCTION

Even if the science of law has many divisions based on the subject it regulates, based on its source, and its applications (e.g. Private Law, Public Law); in essence, it works as a harmonious whole. A conflict, which arises from time to time, between two, or more legal rules, is a problem in guise; and its reality signifies nothing.

This is because the conflict encountered, will still be solved with the input of the science of law; based on the premise that the legal system is a whole.

However, in order to do this correctly, and to achieve the goal aimed for; legal rules and legal institutions must be interpreted properly, through an interdisciplinary outlook.

Otherwise, the legal system which needs to find solutions to the problems; which needs to eliminate conflicts; which needs to establish the public peace, would not be able to perform what is expected.

Contradictions like the one that we mentioned, will be likely to transpire between "Arbitration Law" and "Criminal Law", which have many intersection points; even though they belong to two different disciplines, that belong to different branches of law.

In our study, we have examined a subject that is neglected in law literature, until today. We have examined this subject under different possibilities; and we have suggested different solutions, for the problems that we encounter.

Our paper has been divided into three sections. We examine the following subjects under the following Sections: Section I: the relationship between arbitration, and criminal law, from a general perspective; Section II: direct application of criminal law, and criminal institutions to the arbitration process; Section III: indirect application of criminal law, and criminal institutions to the arbitration process.

The scientific results we have reached have been summarized in the Conclusion Section.

I. INTERRELATIONSHIP BETWEEN ARBITRATION PROCEEDINGS AND CRIMINAL LAW

Judgment is a state function; and under the Turkish Constitution this function is exercised by independent courts on behalf of the people of the

Republic of Turkey (Turkish Constitution Article 9). Also, under the legal jurisdiction rule guaranteed by the Constitution, nobody could be forced to appear in a court other than the one that would have personal jurisdiction over him (Turkish Constitution Article 37/1). When we keep these provisions in mind, as a rule, disputes must be resolved by judges, who are civil servants under the legal procedures defined by laws. Even so, there are provisions in various laws that would allow people other than civil servants to have the power to adjudicate cases. Thus, both the Code of Civil Procedure No. 6100 (TCPL Article 74/1, 103/1-g, 116/1-b, 316/1-f, 407-444)[1], and also the Code of International Arbitration No. 4686 (IAL)[2] regulate voluntary arbitration, and also there are various other laws[3] that would regulate mandatory arbitration.

As a general rule, to be able to resort to arbitration, parties must have had an arbitration agreement between them. Subject of the dispute that leads to arbitration may stem from the agreement itself, and it may also stem from another kind of relationship such as torts, or unjust enrichment. However, disputes that would fall under the realm of criminal law are not arbitrable. Depending on the subject of its arbitrability (TCPL Article 408), an arbitration agreement may be entered before the dispute arises, after the dispute arises, and even during its adjudication (TCPL Article 412/5). An arbitration agreement must be in writing (TCPL Article 412/3); it must set forth the intentions of the parties in a clear and precise manner, and if the arbitration agreement is made through an agent, that person must have been authorized to make an arbitration agreement.[4] Besides, an arbitration agreement would not be taken into consideration *sua sponte*; however, it must be brought forward as an initial objection (TCPL Articles 116-117, 413). Under Article 412 of TCPL[5], arbitration is defined as an agreement to resort to an arbitrator, or an arbitration panel to solve all, or some of the disputes which have arisen, or which may arise between the parties, because of the existence of an agreement, or another legal relationship between the

[1] Official Gazette Dated 4.2.2011 Nr. 27836. For a monograph on arbitration under Turkish Civil Procedural Law *see* Ekşi, Nuray, Hukuk Muhakemeleri Kanunu'nda Tahkim (6100 Sayılı HMK md. 407-444), Istanbul 2013.

[2] Official Gazette Dated 5.7.2001 Nr. 24453. For a brief survey of the Act Nr. 4686 *see* Ekşi, Nuray, *General Evaluation of the Turkish International Arbitration Act*, 8 INTERNATIONAL ARBITRATION LAW REVIEW 3, 87-94 (2005).

[3] For provisions regarding arbitration under other laws, *see* Ekşi, Hukuk Muhakemeleri Kanunu'nda Tahkim, at 15-47.

[4] Ekşi, Hukuk Muhakemeleri Kanunu'nda Tahkim, at 96-122.

[5] For the history of Turkish arbitration law *see* Ekşi, Hukuk Muhakemeleri Kanunu'nda Tahkim, at 1 et al; Yeğengil, Rasih, Tahkim, Istanbul 1974, at 75-79; Koral, Rabi, *Yeni ve Eski Hukukumuzda Tahkim (Mukayeseli Etüd)*, İÜHFD, C. 13, S. 1, 1947, at 193-218.

parties. Arbitration is divided into groups such as: "voluntary arbitration", "mandatory arbitration", "ad hoc" arbitration, "institutional arbitration", "domestic arbitration", and "international arbitration". In this study we shall examine the influence of criminal law on arbitration from the perspective of domestic arbitration proceedings, in other words, arbitration proceedings under the TCPL.[6]

Since arbitration is a private law institution governed by the intentions of the parties, at first instance, it is possible to think that it would not have any relation to, or at least no direct relation to "criminal law", which is a division of public law, where absolute mandatory rules govern. In other words, criminal law and arbitration may be viewed as two separate planets. Even so, somewhat direct or indirect influence of some of the criminal law rules on arbitration proceedings is unavoidable.[7] Domestic arbitration laws and most institutional rules are silent regarding criminal law aspects of arbitration. In the doctrine, the relationship between criminal law and arbitration proceedings has not been emphasized well enough.[8] However, within the recent years, the relationship between criminal law and the arbitration institution has been a subject of great importance. For this reason, we must at least draw the general framework of how criminal law might influence arbitration.

II. MATTERS WHEREBY CRIMINAL LAW HAS DIRECT INFLUENCE ON ARBITRATION

A. Arbitrator's Criminal Acts During the Commission of His/Her Duties

1. Arbitrator's Legal Position under Criminal Law

Arbitration proceedings are presided over by an arbitrator, or by a panel of arbitrators elected according to a procedure defined under the

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[6] For a brief survey of legislation and treaties to which Turkey is a party *see* Ekşi, Nuray, *Legal Framework of Commercial Arbitration in Turkey: International Commercial Arbitration—A Comparative Survey*, ICOC Publication No: 2007/45, Editors Nuray Ekşi/Pedro J. Martinez-Farga/William K. Sheehy, Istanbul 2007, at 85-116.

[7] Ghaffari, Amir, *Criminal Offences Committed through the Arbitration: Duty to Report & Investigate? Duty to Testify? Liability & Immunity?*, *available at* www.arbitration-ch.org,26.05.13; ICC Launches New Task Force on Criminal Law in Arbitration, *available at* http:// www. enewsbuilder. net/ uscib_news/ e_article 000348761.cfm?x= b11,0,w (26.5.2013).

[8] For the effects of criminal law on arbitration *see* Mourre, Alexis, *Arbitration and Criminal Law: Reflections on the Duties of the Arbitrator*, 22 (1) JOURNAL OF THE LONDON COURT OF INTERNATIONAL ARBITRATION, 95-118 (London 2006); Okuyucu-Ergün, Güneş, *Tahkimde Ceza Hukuku Sorunları,* TBB Dergisi, S. 70, Yıl 2007, at 135-161; Hwang, Michael/Lim, Kevin, *Corruption in Arbitration—Law and Reality*, 8 (1) ASIAN INTERNATIONAL ARBITRATION JOURNAL, 1 et seq (2012); Hiber, Dragor/Pavic, Vladimir, *Arbitration and Crime*, 25 (4) JOURNAL OF INTERNATIONAL ARBITRATION, 461-478 (2008).

parties' agreement. Both under Articles 415-422 of TCPL, and also under various other statutes regarding arbitration, there are provisions stating the duties and obligations of the arbitrator during an arbitration proceeding. Regarding the arbitrators' liabilities under private law, there exist various other countries' laws, and the rules of arbitration centers.[9] Even so, regarding the arbitrators' legal position from the perspective of criminal law, neither under Turkish arbitration laws nor under Turkish criminal law, there is any special provision except the one that is under Article 252 (7) of the 5,237 numbered Turkish Penal Code.[10] For this reason, general provisions must be examined to evaluate, and to reach a decision.

The expression "civil servant" under Article (6) (1) (c), and (d) of TPC, refers to an individual who takes part continually or temporarily in the execution of public duty; who attained this position either by appointment, or by election, or by any other manner; the expression "conducts the duty of judgment" refers to higher courts, civil, administrative, and military courts, and their members and their judges; and attorney generals and lawyers.

Even though they conduct a type of adjudication during the arbitration proceeding, arbitrators are not civil servants, unlike the appointed judges. Under the arbitration rules, the parties to the dispute can choose the arbitrators. Even so, an arbitrator resolves the disputes through arbitration, and his/her decisions end up being the subject of judicial review, and compulsory performance. Also, the arbitrator is obligated to conduct his/her duties impartially, and independently, any contrary behaviour on his/her part, would lead him/her to rescue himself/herself of his/her duties, or he/she may be rescued.[11] Even though, it is possible to say that the arbitrators perform the function of adjudication due this basic function, since they do not have the title of judge, prosecutor, or lawyer, they cannot deem to be under the category of "conducts the duty of judgment". However, the work undertaken is a public act, and for this reason under TPC, an arbitrator retains the position of a civil servant, like any other appointed or elected individuals who participate in the execution of a public act.[12]

2. Arbitrator Who Receives Bribes

Under TPC Article 252 paragraph (7):

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[9] Süral, Ceyda, *Hakemin Sorumluluğu*, İstanbul Kültür Üniversitesi Hukuk Fakültesi Dergisi, C. 10 S. 2, at 229-254.
[10] Official Gazette 12.10.2004/25611.
[11] Pekçanıtez, Hakan/Atalay, Oğuz/Özekes, Muhammet, Hukuk Muhakemeleri Kanunu Hükümlerine Göre Medeni Usul Hukuku (12th ed., Ankara 2011), at 741, 747-748.
[12] Okuyucu-Ergün, Tahkimde Ceza Hukuku Sorunları, at 156-157.

> In case that a person who receives a bribe, or who asks for a bribe, or who enters into an agreement on this subject happens to be an adjudicator, an arbitrator, an expert witness, a notary public, or a certified public accountant, the penalty will be raised from one third up to one half.

Therefore, the arbitrators are able to commit the crime of bribery. The crime of bribery is considered a "specific crime" for the fact that it can only be committed by civil servants, and by people who have special qualifications. The public nature, and the importance of the duty that the arbitrator undertakes, lead the arbitrator to be penalized for committing the crime of bribery. In fact, under the general provisions of TPC (Article 6), an arbitrator is not stated as an "adjudicator" or a "civil servant", even so regarding the provision of bribery he/she is hold up to the same standards as the adjudicators. Thus, as an indication of this understanding, when receiving a bribe, asking for a bribe, or entering into an agreement to receive a bribe, like a judge, a prosecutor, a notary public, an expert witness, or a certified public accountant, an arbitrator will be penalized for the crime of specific bribery which would require a much severe measure of penalty (TPC Article 252/7, 9-e).

Although Turkish Penal Code has only one article which relates to the criminal responsibility of arbitrators, recent amendments made in the criminal codes of certain countries such as China and Austria, introduce many more provisions on this subject. According to the latest amendment to the Chinese Penal Code Article 399, an arbitrator who intentionally violates the law and misrepresents the facts when rendering a judgment may face up to three years of imprisonment.[13] Austrian Criminal Code[14] has much more comprehensive provisions relating to the criminal responsibility of arbitrators. Arbitrators can be found guilty if they accept a benefit or a bribe. Article 331 of the Austrian Criminal Code provides that a judge, or an arbitrator who demands, or accepts the promise of a future benefit on behalf of himself or on behalf of a third person in exchange for his performance, or for a future performance of a judicial act, shall be punished with imprisonment for not more than five years, or a fine. An attempt shall be punishable. If an arbitrator receives a bribe, he/she is also punished under Article 332 (2) of the Austrian Criminal Code. This article says that a judge or an arbitrator, who demands, allows himself to be promised or who

[13] Jingzhou, Tao, *Arbitration Law of the PRC*, Chapter IV, Section 2, Article 38, Liability of Arbitrators in Serious Cases (Loukas A. Mistelis ed.), *Concise International Arbitration*, Kluwer Law International 2010, at 689-689.

[14] Criminal Code (Strafgesetzbuch, StGB) as promulgated on Nov. 13, 1998, Federal Law Gazette I, at 945, 3322, http://www.iuscomp.org/gla/statutes/StGB.htm#genpart (last visited Sept. 13, 2013).

accepts a benefit for himself or on behalf of a third person in return for his/her performance, or for a future performance of a judicial act, and thereby violates or would violate his/her judicial duties, he/she shall be punished with imprisonment from one year up to ten years. In less severe cases, the punishment shall be imprisonment from six months up to five years. Article 339 of the Austrian Criminal Code regulates criminal liability of public officers as well as arbitrators, for obstruction of justice. According to this article, a judge, a civil servant or an arbitrator, who while conducting or deciding a legal matter is guilty of obstruction of justice for the benefit, or to the detriment, of a party, shall be punished with imprisonment from one year up to five years.

3. Arbitrator Who Commits the Crimes of Misconduct, Fraud, Corruption, and Embezzlement

Under Turkish laws, there is no express provision regarding an arbitrator's criminal liability for his/her misconduct during the course of arbitration. Even so, as we have mentioned earlier, since the arbitration process is a special type of adjudication, and the arbitrator undertakes the duty of adjudication, if other conditions also exist, arbitrator may be prosecuted for the crime of "misconduct" (TPC, Article 257). For example, in case that he/she makes a biased decision based upon bias, animosity, receiving benefits other than bribes, we can say that the crime of misconduct has occurred. In case that an arbitrator commits fraud in relation to arbitration, depending on the other specifics of the act, crime of fraud would have been committed under TPC Articles 204-205, 211. It is also possible to reach the same result regarding the crimes of embezzlement (TPC, Article 247), and corruption (TPC, Article 250).

B. Arbitration as a Tool for Money Laundering

Recourse to arbitration by criminals, or criminal organizations is among some of the different methods for money laundering. Therefore, an arbitral proceeding may commence for a fraudulent claim, and used as a tool for money laundering.[15]

> One important concern is the laundering of the proceeds of crime, through a fraudulent dispute which is rapidly settled. The parties ask the tribunal to embody a settlement of their "dispute" in a consent award through which an unlawful

[15] Hiber/Pavic, at 463.

payment is successfully hidden.[16]

When arbitration is used as a tool for money laundering, the parties may be confronted with criminal prosecution in accordance with the provisions of TPC Article 282.

C. When a Crime Related to Arbitration Is Committed by Individuals Other Than Arbitrators

Even though, arbitration is a proceeding conducted by an arbitrator, third parties such as parties to the arbitration proceeding, witnesses, expert witnesses, interpreters, attorneys may also take part in arbitration proceedings. Therefore any of these individuals may also commit a crime. For example, it is possible for one of the parties to forge a document regarding an arbitration matter, and use that forged document; for one of the witnesses to give false testimony; or for an expert witness to prepare a fraudulent report. If any of these aforementioned situations happened, the person who participated in such activities may be prosecuted under the relevant provision(s) of TPC.

D. Influence of Criminal Court's Decision on Arbitration Proceedings

In the event that there is a final decision that the arbitrator has committed one of the aforementioned crimes regarding the continuation, and final results of arbitration, this decision would be binding (The Constitution Article 11, 138). Besides, if the parties, or interested third parties had committed a crime related to the arbitration proceeding, and if they have been convicted of this crime, this conviction would have an effect on the arbitration procedure (The Constitution Article 11, 138). For this reason, under Article 439 of TCPL, arbitrator's final judgment would be annulled; in the event that the statute of limitations for annulment has already run out, under TCPL Article 433, it would be possible to restart the arbitration procedure.

> In the event of a conviction of any of the parties to arbitration, or any person related to arbitration proceedings for any of the crimes mentioned above, or for any other crime related to arbitration [Code of Criminal Procedure (CCP) Article 223], its effects on arbitration must be evaluated under various possibilities. We can list these possibilities

[16] Blackaby, Nigel/Partasides, Constantine/Redfern, Alan/Hunter, J. Martin H., Powers, Duties, and Jurisdiction of an Arbitral Tribunal in Redfern and Hunter on International Arbitration (Oxford University Press 2009), at 337.

in the following way:

(1) The related party in the arbitration proceedings, for example, an arbitrator, an expert witness, or a witness, is also the perpetrator of the crime in the case, and the conviction decision against him/her has been finalised (CCP Article 223/5-6). In this case, the final decision of conviction, based upon the event that the criminal court made its decision, would be binding on the arbitrator regarding the arbitration proceedings;

(2) The individual who is involved in the arbitration proceedings is not the perpetrator of the crime that he/she had been accused of, and for this reason a judgment of acquittal has been made and this is a final judgment (CCP Article 223/2-b). In this situation, by the final judgment of the criminal court, it is proven that the individual had not committed the crime that he had been accused of. This decision would be binding upon the arbitration proceedings (Constitution Article 11, 138);

(3) At the end of a criminal adjudication, regarding the individual related to the arbitration proceedings, there may be a judgment of conviction, or acquittal, or the public case may be abatted, or might be dismissed or there may be a decision stating that there is no reason for the accused to be punished (CCP Article 223). In this case, the judgment rendered would not be binding upon arbitration.

III. MATTERS WHEREBY CRIMINAL LAW WOULD HAVE DIRECT INFLUENCE ON ARBITRATION

A. The Judgment of the Criminal Court Is a Preliminary Issue Regarding Arbitration Proceedings

Due to the fact that the legal system is a whole, the decisions of the government bodies, and especially the judgment of the courts of law must not be contradicting one another. Even so, since legal matters, and procedures have their own peculiar characteristics, in certain matters partially different legal situations may emerge. In a situation where rendering the judgment is partially or wholly based upon another lawsuit, or upon the determination of an administrative authority, or the existence or non-existence of a relationship regarding the subject matter of the law suit, then until a final judgment of that matter is entered by the court of law, or a determination is rendered by the administrative authority, it would constitute a preliminary matter as far as the court is concerned (TCPL Article 165/1).

During arbitration proceeding, a criminal investigation, or a criminal

prosecution regarding the parties to the arbitration, or related parties, may be the issue. In that case, since the final result of the investigation, or the prosecution might have an effect on arbitration, whether these must become the subject of preliminary matter or not, would be an issue. There may be a criminal investigation, or prosecution initiated against the arbitrator regarding misconduct, bribery, or fraud. For the reasons mentioned above, the parties to the arbitration might also initiate a lawsuit against the witnesses, the interpreter who took part in the arbitration proceedings. Under the Turkish laws, there is no express provision that would make criminal investigations or criminal prosecutions a mandatory preliminary matter regarding arbitration proceedings. Thus, the arbitrator is not obligated to wait for the final judgments on these matters. However, there also is no contrary provision that would constitute a bar for the arbitrator to treat this as a preliminary matter.

Moreover, under "Turkish Code of Obligations (TCO)" Article 74, when the arbitrator is deciding whether the abator is at fault, whether the abator has mental capacity or not, since he/she would not be bound by the liability provisions of the Penal Code, he/she may not treat the judgment on these issues as a preliminary matter. Besides, since the decision of the criminal court judge regarding the evaluation of fault, and the proof of fault would not be binding upon the civil court judge, and therefore would not be binding upon the arbitrator, it also is not possible for these issues to constitute preliminary matters.

Finally, under TCPL Article 239/1, the legislature has structured it so that, after the oath has been administered, a criminal law suit initiated for committing perjury, would not constitute a preliminary matter. In this case, prosecution initiated against an accused after the oath has been administered in an arbitration proceeding, would not constitute a preliminary matter. Even so, if the accused is convicted of such crime, the arbitration proceeding would start over (TCPL Article 375, 443).

B. Problem of Inadmissible Evidence in an Arbitration Proceeding

The parties may freely decide on the procedures that would govern the arbitration proceedings among themselves; or they may also refer to the procedures of the arbitration centers. If there is no agreement on this issue, the arbitrator or the panel of arbitrators would conduct the arbitration proceedings by keeping an eye on the relevant provisions of TCPL as they may deem suitable (TCPL Article 424). Therefore, in an arbitration proceeding, parties' intentions would be the determining factor regarding

the governing procedure. Even so, such freedom would be constricted by general principles of law, and provisions of civil order (TCPL Article 424, 439/2-, f, g, ğ).[17]

A matter of reflection in arbitration procedure from the perspective of the influence of criminal law, is the issue of inadmissible evidence. In fact, the evidence that forms the basis of the arbitral award, must be admissible evidence. Under Article 38 (6) of the Constitution, "illegally obtained evidence, cannot be entered as evidence". Obtaining illegal evidence is very widely defined in the Constitution, it is somewhat narrower under Article 189 (2) of TCPL titled "right to evidence". Under Article 189 (2) of TCPL, "the court may not use illegally obtained evidence to prove an event".[18] Even if this provision is not directly related to arbitration, it still would be binding upon an arbitration proceeding.

In arbitration, regarding inadmissible evidence related to criminal procedure, a few matters may be at issue. The first of these, is the tainted evidence—the subject matter of evidence which would constitute a crime. In this hypothetical, if the evidence is obtained through torture, maltreatment, robbery, trespass to real property, invasion of privacy, or invasion of communication, that type of evidence would be inadmissible in an arbitration proceeding. Second, inadmissible evidence because of illegality would be inadmissible evidence in criminal court (CCP Article 217/2). Since the legal system works as a whole, and when we consider the nature of the criminal proceedings, arbitrator should not be able to allow this type of evidence in, either. Third possibility, is the evidence that is obtained during criminal proceedings to prove certain types of crimes. In this regard, for example evidence that is obtained through wire tapping (CCP Article 135-138), use of secret agents (CCP Article 139), and technical surveillance (CCP Article 140) may not be used in arbitration (unless the criminal proceedings result in conviction).

Wire tapping, use of a secret agent, and technical surveillance, are all among basic human rights and freedoms. Freedom of communication, and limits on invasion of privacy, these are protective measures guaranteed especially under Articles 20-21 of the Constitution, and they can only be limited reasonably, and by law (the Constitution Article 13, 20, 22).

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[17] Erkan, Mustafa, *Tahkim Şartının Ayrılabilirliği Prensibinin Asıl Sözleşmenin Yokluğu Durumunda Değerlendirilmesi*, Gazi Üniversitesi Hukuk Fakültesi Dergisi C. XVII Y. 2013 S. 1-2, at 536.

[18] It must be emphasized that this provision has been enacted parallel to both Article 38 (6) of the Constitution, and to the statement "*accused crime may be proven by any kind of legally obtained evidence*" under Article 217 (2) of the CCP. It is good that the legislature to have enacted this provision.

Any of the afore mentioned methods which have been enacted by the legislature are implemented to take protective measures for certain types of crimes, and they would fall under the realm of criminal procedure; for this reason, it is unthinkable to implement any of these methods within the realm of private law which has a different purpose, a different subject matter, and a different type of procedure.[19]

CONCLUSION

Even though arbitration is a private law institution, it would be unavoidable for it not to intercept with criminal law at times. Especially, in the event that the parties, the arbitrator, the witness, the expert witness, or the interpreter commits a crime related to his/her duty, or position in the arbitration proceedings, the effects of criminal law on arbitration proceedings would be definite. Besides, regarding the arbitration proceedings, the issue of whether or not the criminal investigation, or the prosecution of the aforementioned individuals would be a preliminary matter, is of great importance. Since there is no statute stating that the arbitrator must assume that a criminal investigation or a criminal prosecution would be treated as a preliminary matter, the arbitrator must be vigilant in these situations; in case there is no worthy evidence, he/she should not be affected by actions that would prolong the arbitration period.

In connection with criminal law, inadmissible evidence will also be an issue in an arbitration proceeding. In this regard, criminal evidence, evidence that could only be admitted in criminal proceedings, or irrelevant evidence that would not be taken into account by a criminal court due to its inadmissibility, none of these types of evidence should be admitted in an arbitration proceeding.

Even though, the legal position of the arbitrator who is conducting the arbitration proceedings has not been specifically defined under the criminal law provisions; in the event he/she would commit the crimes of bribery, misconduct, and other types of similar crimes, during the commission of his/her duties, he/she would be prosecuted under the Penal Code, like any other civil servant.

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[19] *See* Arslan, Çetin, *Ceza Muhakemesinde İletişimin Denetlenmesi Yoluyla Elde Edilen Delillerin Disiplin Hukukundaki Durumu Üzerine Bir Değerlendirme*, Fasikül Aylık Hukuk Dergisi (CAHAMER), Yıl 2010 S. 3, at 15-24.

RIGHT TO INFORMATION: AN ARDUOUS JOURNEY FROM BRITISH RAJ TO INDEPENDENT INDIA

Jitendra Mishra[*]

Democracy is the axis of Indian polity. It requires openness and transparency in every sphere of country's governance. Right to Information is the core of openness and transparency. It is not only a lifeline but also an acid test for an alive and vibrant democracy. After a long battle against "secrecy-regime", Right to Information found legislative sanction in the year 2005. But, the task is not over; because it is not easy to sensitize people in power to do away with the century old colonial legacy of "secrecy-regime", which helped them to play safely, just by enacting a single piece of legislation. Both political parties and bureaucracy are not accepting the norms set by the Act whole heartedly due to this reason. They often gang up to scrap the Act as well as the decisions of the competent authorities. Massive effort is, therefore, required from every quarter of the society including all democratic institutions to adopt the policy of openness and transparency by putting themselves within the compass of the Act. Only then we would be nearer to the goal of Gandhian concept of "Swaraj" and "Suraj".

INTRODUCTION

Democracy based on participatory process is the basic feature of Indian polity. Informed votaries are the axis of democracy. It rests on the basic premise that people should not only be aware and informed of the Government's policies and programmes meant for them but also be informed of the functional follow up of those policies and programmes. Democracy thus expects openness in the functioning of the government.

In a democratic country, like India, "Right to Information" is an integral right. Free flow of information to the people does not only create an

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enlightened and informed public opinion; it renders those in authority accountable also.[1] It empowers people to assess the performance of the government and its authorities and thereby pass their verdict regarding sustainability of the government in its office.

The "Right to Know" and "Right to Information", wherefrom the concept of open government emanated are the foundation of an alive and vibrant democracy. These rights are implicit in Articles 19 and 21 of the Constitution of India. After judicial recognition in numerous cases[2] followed by several nation-wide movements, it acquired express legislative shape in 2005, i.e., Right to Information Act, 2005 (hereinafter referred to as the Act). However, it is worth examining the functional follow up of the Act.

Acquiring overawing behavior towards the common man, bureaucrats often treat their queries either with complete callousness, outright hostility ranging from rude refusal to physical harm or with a statement of refusal citing various reasons viz. official secrecy and non-availability of papers etc. Official Secrets Act, 1923 is a potent weapon to them. Even a literate and prudent man being quite aware of his rights becomes apathetic in view of fear of bearing harm if he annoys the government officials by demanding his rights.

Even after 66 years of Independence, people suffer at the hands of corrupt officials of public domain. Corruption and criminalization of politics have made a complete mockery of democracy in India. Eroding the human values both are striking at the roots of democracy. Magnum size of corruption which took place during last few years reminds us that if we have to sustain indeed deepen out our liberal democratic way of life we must give more thought to the openness and transparency in the governance of the country.

The present global trend is fortunately favourable to the regime of openness and transparency. Rights have been recognized and rules have been framed thereof. But, the problem is not over. Only making of laws and framing of rules is not sufficient unless there is a pious will to enforce them. Recent approach of all the political parties of India clearly depicts that they are not ready to put themselves within the umbrella of the Act. They are pleading to amend the Act. The Government, under the pressure of political parties, decided to amend the Act. Other institutions are also not lagging behind.

In view of these, it has become imperative to look the arduous journey

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[1] Statement of former Prime Minister Late V.P. Singh quoted in "History of Right to Information"; nyay bhumi. Org.

[2] Infra: "Right to Know and the Judiciary".

of "Right to Know" from an opaque era of "British Rule" to modern democratic era of informed citizenry a fresh along with attitude of democratic institutions in India. This is precisely what the present study proposes to do.

I. GENESIS OF RIGHT TO INFORMATION

A global sweep of change could be seen in favour of transparency and openness soon after concluding the World War II. Almost all the democracies and international organizations included "Right to Know" and "Right to Information" in their constitutions, statutes and resolutions (instruments).[3] Adopting the policy of openness, i.e., disclosure of official documents through legislative measures in 1766, Sweden is, however, the champion in this regard. Right to Information is now regarded as the fundamental human right in Sweden.

The genesis of the concept of "Right to Know" and "Right to Information" can be traced into long back history of India. The ancient Vedic literatures like "Yajurveda"[4], the "Holly Book Gita"[5], and Islamic literature "Sahih Muslim"[6] recognize and exemplify the importance of these rights.

The age-old golden rule of transparency and openness in governing system did not found place in colonial era of "British Raj" in India. Bureaucrats in British India were used to work in the atmosphere of secrecy. In fact, the colonial government was not responsible to the people of India. Laws were made and used only for suppressing the information and thereby curbing the freedom of Indians in order to achieve selfish ends of British. Disclosure and use of any official information were made offence unless it was expressly authorized.[7]

Before passing the Act, carrying on the legacy of "British Raj", the bureaucrats of Independent India also regarded secrecy as a rule and openness as an exception under the veil of the Official Secrets Act and the

[3] For example: Article 19 of UNDHR, 1948; Article 19 of ICCPR, 1966; USA—Right to Information Act, 1966; UK—Freedom of Information Act, 2000; Canada—Access to Information Act, 1983; New Zeland—Official Information Act, 1982; Australia—Freedom of Information Act, 1982, etc.

[4] Rigveda 1/891.

[5] The Bhagavadgita 4/17.

[6] The Book on Govt. (Kitab Al-Islam)—Translation of Sahih Muslim, Book 20; http://qurango.com/muslim/020.Smt.html (last visited Nov. 23, 2010).

[7] Section 5 of the Official Secrets Act, 1923 makes a criminal offence of all unauthorized disclosure of information from official sources, regardless of consideration whether public interest really demands secrecy. It provides for punishment to a person guilty of an offence under this section with imprisonment for a term which may extend to three years, or with fine or with both. This section is equally applicable to both communicant and recipient of unauthorized documents and information classified as secret.

Civil Service Conduct Rules. The reason is not far off to seek. Secrecy helps them to cover up their irregularities and deficiencies. Bureaucrats, being incognito, often act secretly for the convenience of the government in power. Secrecy helps them to play safely.[8]

In view of national interest, the need of administrative secrecy is inevitable in certain spheres of state affairs. All the information that a government possesses cannot be revealed.[9] However, the area of secrecy regime should be kept as an exception, not as a rule. Under the veil of secrecy, the legitimate expectation of being informed citizenry could not be ignored. Secrecy regime hampers the survival of democracy. Democracy and secrecy, thus, cannot co-exist. If secrecy is permitted to flourish in the functioning of the government and thereby governmental action is kept hidden from public gaze, corruption and misuse or abuse of authority would certainly be aggravated. Many instances of flouting the principle of transparency may be quoted in this regard.[10]

Prior to the Act, we did not have any law to combat secrecy regime. The legitimate expectation of people to get information could not found due attention of the authorities. Even, the Constitution of India does not contain any express and specific right to know and right to information. However, it has been extracted by the Judiciary from various provisions including preamble of the Constitution.[11]

A long awaited move against the secrecy regime started breathing at almost all the fronts of the society in early 70s with the implication that the right to know and to information is related to the problem of common men. The judicial process and peoples' movements together with vigilant media in order to strengthen peoples' right to know have almost broken the secrecy regime.

II. JUDICIAL RESPONSE

Freedom of expression is essential for sustentation and progress of a democratic society. It provides a mechanism to establish a reasonable balance between stability and social change.[12] Significance of the freedom

[8] Massey, I. P., Administrative Law (2005), at 483.
[9] *See* Clause (2) of Article 19 of the Constitution.
[10] For example: Fodder Scam, Urea Scam, Urban Housing Scam, Petrol pumps Allotment scam, 2-G Spectrum Scam, Coal allotment scam etc.
[11] Articles 19 (1) (a) and 21 of the Constitution of India.
[12] Indian Express Newspapers Ltd. v UOI, (1985) 1 SCCC 641; *See also* Ashdown v. Telegraph Group Ltd., (2001) LR 685 (Ch. D.); Handy side v. U.K. (1976) 1 EHHR 737; Vogt v. Germany (1995) 2 EHRR 205.

of expression and imparting information is reflected in an English case "R.V. secretary of State for Home Depot. Exp. Sims". Lord Steyn thus observed:

> Freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate…It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[13]

The same is reflected in an American case, New York Times v. United Sates, also, wherein Douglas, J. Stated:

> Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open discussion based on full information and debate on public issues are vital to our national health.*[14]*

The malady of corruption, maladministration and criminalization of politics unfortunately gripped India even after independence. Consequently, transparency and openness in governing system had become the call of the time. In absence of any express legal provision, the task of filling the legal vacuum was entrusted to the Judiciary. Being sentinel of the Constitution, the Supreme Court of India vivified the concept of openness holding that it is directly emanated from right to know[15] and read it into Articles 19 (1) (a) and 21 along with the preamble of the Constitution. Actually, the Supreme Court sowed the seeds of these rights soon after independence in its judgment in Romesh Thapar v. State of Madras[16] stating that without free political discussion no public education, essential for the proper functioning of the processes of popular government, is possible.[17] Fostering the scope of "Right to Know", Justice A. N. Ray (as he then was) held in Bennet Coleman and Co. v. Union of India that the faith in the popular government rests on the old dictum, "let the people have the truth and the freedom to discuss it and all will go well".[18]

The public interest in the freedom of discussion thus stems from the requirement that the members of a democratic society should be sufficiently informed so that they may influence intelligently the decisions affecting themselves.[19] Right of all citizens to know and be informed is, thus, accepted by the Judiciary in India.[20]

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[13] (2002) 2 LR 115 (AC).
[14] 48 US 403.
[15] S.P. Gupta v. Union of India, 1981 Supp. SCC 87, at 275.
[16] AIR 1950 SC 124.
[17] *Ibid*.
[18] (1972) 2 SCC 788.
[19] Attorney General v. Times Newspapers Ltd. (1973) 3 WLR 298 (HL); This decision is very aptly quoted by the Supreme Court in Indian Express Newspapers v. Union of India (1985) 1 SCC 641.
[20] *Supra* note 18, at 846.

Right to Know acquired altogether a new dimension in Raj Narain v. State of U. P.[21] Mathew, J. in his concurring opinion, thus, emphatically observed:

> The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing…The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.[22]

Right to Know acquired the status of constitutional right in S. P. Gupta v. Union of India.[23] Bhagwati, J. (as he then was) observing that the right to know is derived from right to freedom of speech and expression guaranteed under Article 19 (1) (a), recognized it as "sine qua non" of really effective participatory democracy and granted it the status of fundamental right.[24]

Similar approach of the apex Court could be seen in Indian Express Newspapers v. Union of India.[25] It was observed that the fundamental principle involved in the freedom of speech and expression is people's right to know which necessitates that all members of the society should be acquainted with information. Freedom of speech and expression should, therefore, receive a generous support from every quarter of the society believing in participation of the people in administration.[26]

Underscoring the importance of right to know Justice Sabasachi Mukherji (as he then was) established its relationship with Article 21 of the Constitution in Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd.[27] Holding that a successful democracy posits an "aware citizenry", the importance of right to information was also marked by Justice P. B. Sawant in Secry. Ministry of Information and Broadcasting, Govt. of India v. Cricket Association of Bengal[28] His Lordship thus observed:

> True democracy cannot exist unless all citizens have a right to participate in the affairs of the polity of the country. The right to participate in the affairs of the country is meaningless unless the citizens are well informed on all sides of the issues, in respect of which they are called upon to express their views. One-sided information, disinformation, misinformation and non-information all equally

[21] (1975) 4 SCC 428.
[22] *Id.* at 453.
[23] 1981 Supp. SCC 87.
[24] *Id.* at 275.
[25] (1985) 1 SCC 641.
[26] *Id.* at 686.
[27] AIR 1989 SC 190.
[28] (1995) 2 SCC 161

> create an uninformed citizenry which makes democracy a farce.[29]

Again, in Dinesh Trivedi v. Union of India [30] Ahmadi, C. J. acknowledging the importance of participatory democracy observed:

> To ensure the continued participation of the people in democratic process, they must be kept informed of vital decisions taken by the Government and the basis thereof. Democracy, therefore, expects openness and openness is concomitant of a free society. Sunlight is the best disinfectant.[31]

Further, democracy cannot survive without free and fair election and without free and fairly informed voters. Voter is thus entitled to know antecedents including past criminal history of the candidate so that he "may think over before making his choice of electing law-breakers as law makers".[32]

To conclude, freedom of information is the lifeline of a democracy. It is a fundamental right under Article 19 (1) (a) of the Constitution.[33] Any attempt to stifle, suffocate or gag this right would sound a death—knell to democracy and would help usher in autocracy and dictatorship.[34] The State has had thus no chance but to ensure the availability of this right to its citizen. However, fundamental rights guaranteed by the Constitution of India are not absolute in nature. They are subject to several restrictions, limitations, exemptions and exceptions.[35] It is equally true in respect of the right to information also. State can thus withhold the information in certain exceptional cases.

III. PEOPLE'S MOVEMENTS

There has been a big gap between promises and performance of politicians in power. History of independent India is replete with the instances of grabbing "lion's share" of resources and welfare funds meant for people at grass root level by the red tape and corruption. Consequently, common men are deprived of their due. It is nothing but tyranny with "WE THE PEOPLE OF INDIA", who adopted a democratic form of government and is running it with creedal faith since Independence. It needs hardly be reiterated that both "democracy" and the "rule of law" require openness and

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[29] *Id.* at 229.
[30] (1997) 4 SCC 306.
[31] *Id.* at 314.
[32] Union of India v. Assn. for Democratic Reforms (2002) 5 SCC 294 at 322.
[33] PUCL v Union of India (2004) 2 SCC 476 at 494.
[34] LIC of India v. Prof. Manubhai D. Shah (1992) 3 SCC 637, at 650.
[35] *See* for detail clause 2 of Article 19 of the Constitution of India; Official Secrets Act, 1923 etc.

transparency as "where laws end tyranny begins".[36] A common man, in such a situation, has no way but to fight for transparency and right to information. The initial struggle in this regard was led by a known people's organization —the Mazdoor Kisan Shakti Sangthan (MKSS)—in Rajasthan. The device of public hearing adopted by the MKSS proved to be very effective measure of creating awareness among people and mobilizing them to fight against corruption. The success of MKSS movement spread over in Rajasthan and very soon it engulfed other states also.[37]

It is evident from the foregoing discussion that the judicial process could not ruin the undefeatable stronghold devilfish of secrecy unless it was supported by the public at large. For, unless society is ready to accept any particular dispensation, courts cannot do anything. The judicial process coupled with peoples movements thus led to a country wide demand for enacting a law to assure the right to information of citizens in India. After all, it took more than half century in acquiring the legal shape. This clearly shows that even after 66 years of Independence, the Gandhian concept of "Swaraj" and "Suraj" is still a mirage.

IV. AN OVERVIEW OF THE ACT

In view of mounting public pressure and on the recommendations of the Law Commission of India and several committees[38] to enact a progressive, participatory and meaningful specific law on the subject, the Act was legislated in 2005 and was implemented from October 12th, 2005. It has overriding effect on each and every enactment containing inconsistent provisions therewith.[39]

The main objectives of the Act are to operationalize the fundamental right to information and to set up systems and mechanisms for having an easy access to information and to promote transparency and accountability in governance in order to minimize corruption and inefficiency in public offices. The Act sets up a practical regime of right to information. It enables

[36] Statement of William Pitt quoted in Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405, at 413.

[37] MKSS movement was followed by Anna Hazzare in Maharastra; Sunder Lal Bahuguna of "Chipko Movement" in Uttara Khand; Medhapatekar of Narmada Bachao Andolan; the opposition to the Silent Valley Project in Kerala and the Groups fighting for the victims of Bhopal Gas Tragedy.

[38] The 179th Report of Law Commission of India, 2001; the Press Council of India under the guidance and chairmanship of Justice P.B. Sawant, a retd. Judge of the Supreme Court; the H.D. Shourie Committee and the National Advisory Committee which become the basis of enactment of R.T.I. Act, 2005.

[39] Section 22 of the Act.

the citizens to secure access to information[40] under the control of public authorities.[41]

The scope of the Act is much wider. It is applicable to all constitutional authorities of executive, legislature and the Judiciary, and any institution or body established by an Act of Parliament or a State legislature. Barring certain exempted categories of information[42], every public authority is under obligation to provide information sought for a payment of requisite fee.[43] Moreover, the information which cannot be denied to the Parliament or State legislatures shall not be denied to any person. The Act thus sets up the mechanism for providing information sought for and the system of appeal in a very effective manner.[44] Any public authority who fails to comply with the norms set by the Act shall be subject to punishment.[45] The information sought for shall be provided free of charge to the person concerned if it is not provided within prescribed time frame.[46]

However, information invading privacy and having no relation with public activity and public purpose could not be provided under the Act.[47] The Act, thus, establishes a harmonious balance between competing interests of government in preserving the confidentiality of sensitive information and privacy of individuals on one hand and right to information for the citizens on the other.

Despite all these admiring provisions, the Act is not free from criticism on several counts.[48] Law for protection of the whistleblowers and RTI activists is still awaited. During the last several years, a number of cases relating to threat and murder of whistle blowers and RTI activists have unvarnished the Act to some extent.[49]

CONCLUSION

Freedom of debate and discussion is the life blood of democracy. Free flow of information is a viable weapon to keep a democracy alive and vibrant. It equips people with knowledge and thereby enables them to make

[40] *See* Section 2 (f) of the Act for definition of information.
[41] The term Public Authority is defined under Section 2 (h) of the Act.
[42] *See* Sections 8 and 9 of the Act.
[43] Section 6 of the Act.
[44] Section 19 of the Act.
[45] Section 20 of the Act.
[46] Section 7 (6) of the Act.
[47] Section 8 of the Act.
[48] Misra, Jitendra, *Right to Information Act, 2005: An Instrument of Good Governance and Transparency*, 48 CIVIL & MILITARY LAW JOURNAL, 172-175 (2012).
[49] *Ibid*.

informed choice. A democratic government cannot survive without accountability. The basic postulate of accountability is that the people should have the information about functioning of the government. Information is, therefore, a safety valve against corruption and idleness.

Information is the national property which rests with the government. It is fundamental right of citizens of India. A democratic government is thus duty bound to provide required information to its people. Without having proper information, people cannot exercise their rights as citizens to participate in the affairs of polity of the country. Access to information is, thus, vital for democratic way of social life.

In order to check the maladies of maladministration, mismanagement, corruption and delays plaguing the public offices which a common man faces in his day-to-day life, the Right to Information Act, 2005 was enacted by the Parliament. It was hoped that the Act would be proved an effective instrument of promoting transparency and sense of accountability amongst the public authorities. Eight years of the functioning of the Act has been satisfactory to a large extent. But the task is not over as the problem of opacity is still perpetuating.

Making the law on the right to information, the Government has shown its political will in principle. But, there seems a difference between preaching and actual working of the Government. It is reflected by the attitude of the Government itself. Flouting the spirit of transparency, all political parties with connivance of political leadership of India are conspiring to go scot—free from the clutches of the Act. They have resolved that political parties are not bound to disclose the source of their funding. This has been done in view of recent decision of the Central Information Commission (CIC) that all political parties are public authorities under Section 2 (h) of the Act.[50] The Commission has, thus, put them within the ambit of the Act. This order has brought up a storm in the democratic polity of India. The Government under the pressure of political parties decided to amend the Act. The Cabinet has approved accordingly an amendment to Section 2 (h) of the Act on the grounds that political parties are not public authorities and, hence, this law does not apply to them. The proposed amendment says that parties cannot be brought under the Act regardless of any order passed by a court or a tribunal.[51] This attitude has exposed the intention and the political will power of the government.

The move of political parties and the Government to amend the Act would definitely haunt the spirit and expectations of people looking for

[50] The Times of India, June 3, 2013.
[51] The Times of India, Aug. 3, 2013.

responsible and fair governance and would thereby create a chasm between people and the political system. The Government and political parties are, however, facing severe criticism from every quarter of the society. Flouting the norms set by the law is not a new thing for the government. It had tried earlier also to amend the Act for exempting file-noting and the cabinet notes from the purview of the Act, but could not succeed due to massive opposition. The trend adopted by our political leadership exemplifies its future plan and action regarding transparency and openness in our social as well as public life.

Openness in government does not mean openness only in the functioning of the executive branch of the State. The same is required in the functioning of the judiciary also. It is hoped that not only the judiciary but all the democratic institutions including political leadership of the nation will adopt the policy of openness and transparency in their functioning by putting themselves within the compass of the Act so that people's confidence may be maintained in these pious institutions.

INTERNET SERVICE PROVIDERS' LIABILITY FOR PERSONAL DAMAGES ON SOCIAL NETWORKING WEBSITES

Guilherme Magalhães Martins[*] *& João Victor Rozatti Longhi*[**]

The increasing popularity of the Internet in recent times brought profound changes to the society as a whole. Communications mediated by computers are now a consolidated reality in large parts of the world. And the virtual social networks are confused by many with the Internet concept itself. In turn, the Brazilian legal system lacks specific legal rules to address the legal relations taking place within its scope. And the case law is increasingly facing the subject. Within that framework, the doctrine's role is emphasized. Therefore, this article aims at investigating the civil liability for consumer accidents occurred in social networking websites on the Internet. After describing the virtual universe's peculiarities, this paper intends to approach the consequences when consumer accidents occur, since those accidents, considering the technological complexity of that environment, stress the obvious vulnerability of the consumer even more.

INTRODUCTION

"If you are not paying for it, you're not the customer; you're the product being sold." Andrew Lewis said, under the pseudonym Blue Beetle, on the Meta Filter website.[1]

In times marked by the speed, ubiquity and freedom of globalization, new technologies call for an effective consumer protection. In the words of

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[**] João Victor Rozatti Longhi, Professor of Law, Federal University of Uberlandia (MG). Research fields: Civil Law.
[1] Pariser, Eli. O filtro invisível. O que a Internet está escondendo de você. Translation: Diego Alfaro (Zahar, Rio de Janeiro 2012), at 25.

Erik Jayme:

> With regards to the new technologies, the communication made easier by global networks determines greater vulnerability for those who communicate. Each one of us, while peacefully using our computers, has already had a shock to observe that an unknown external power invaded our programs, and the fact we do not know our adversary is even more concerning. Jurists combat fraudulent practices with the classic instruments of tortious civil liability, while the wrongdoers escape all kinds of control and protect themselves in the virtual space.[2]

It is known that in 2001 the Internet suffered a huge transformation. With the vertiginous fall of corporations linked to information technology, the so-called dotcom companies had to radically change their corporate management model in order to overcome the investors' trust crisis related to the profitability of services offered.

That was the outbreak of a trend named Web 2.0, the second version of the World Wide Web, which theoretically recreated the Internet by transforming it in a sort of platform activated by the user, who "voluntarily" uploads the massive content now circulating on the web.[3]

Among the most important changes, we highlight the substitution in the advertising remuneration of content, information and hosting providers, which is no longer measured by the number of people accessing the pages (page views), but for each click on a hyper link (cost per click), reactivating website investments. As previously stressed in the doctrine:

> We shall not forget the commercial value of a website depends directly on its popularity, i.e., on the number of users accessing it. The higher that number is, the most valuable the advertising space and, as a result, the greater the web master's profits will be.[4]

Another striking feature of the current mass society is the offer made by so-called free providers, normally based on indirect remuneration, which

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[2] O direito internacional privado do novo milênio: a proteção da pessoa humana face à globalização. *Cadernos do Programa de Pós-Graduação em Direito da UFRGS.* Translation: Cláudia Lima Marques. Porto Alegre, v. 1, No. i, at 135, Mar. 2003.

[3] According to Tim O'Reilly, creator of the expression, the *Web 2.0* could be illustrated as a great solar system where services rendered are diffuse, making use of techniques that encourage positive conducts from its users. That is the case of vehicles like Wikipedia, a collaborative encyclopedia where users upload the content. Many are the examples: blogs, social networking sites, exchange of P2P files and others. Cf. O'Reilly. Tim. O que é Web 2.0? Padrões de design e modelos de negócios para a nova geração de software. *Available at* http://www.oreilly.com/. Translation: Miriam Medeiros (Technical revision, Julio Preuss, Nov. 2006). *Available at* http://www.cipedya.com/web/FileDownload.aspx?IDFile=102010 (last visited Dec. 9, 2009).

[4] Martins, Guilherme Magalhães, *Responsabilidade Civil por Acidente de Consumo na Internet* (Revista dos Tribunais, São Paulo 2008), at 80.

also attracts the incidence of the rules contained in the Brazilian Consumers Defense Code.

Far from being a reality restricted to certain countries or regions, these practices traverse the habits and penetrate each society's culture, as more people start to use the web.

In its turn, more and more information is brought to the web and becomes available to millions of users worldwide, including data bringing along aspects intrinsically related to an individual's personality. Names, surnames, addresses, religious and affective and other options are the object of a fostered and praised exposure in social and cultural terms.[5]

As a matter of fact, the core of social networks is the interchange of personal data. Users are happy to reveal intimate details of their personal lives, give precise information, share photographs and live the fetishism and exhibitionism of a confessional society.[6]

Huge data banks of personal data are formed at the service of private entities whose economic interests are imperious. The CEE Directive No. 95/46, which relates to the protection of people regarding the treatment and free circulation of personal data, in its Article 2, letter "a", defines personal data as:

> Article 2. For the effects of this directive, it is understood that: a) "Personal data" is defined as any information related to a singular person, identified of identifiable ("concerned person"); everyone who can be directly or indirectly identified with reference to an identification number or one or more specific elements of its physical, physiologic, economic, cultural or social identity is

[5] According to Marcel Leonardi, "The range and type of information available increase exponentially with the use of technology. It is important to remember that once the information is collected in electronic format, it becomes extremely easy to copy and distribute among individuals, companies and countries around the world.

The distribution of information may take place with or without knowledge of the person to whom the data belongs, and intentionally or not. The distribution is unintentional when the records exhibited contain more information than requested, or even when such data is stolen. On occasion, some "registration forms" contain more data than necessary or requested by the user.

As if that was not enough, we must stress the danger erroneous information may represent. Being considered in default when you owe nothing, or being refused a job opportunity for no apparent reason are only a few examples of damages that may be caused by incorrect, outdated or intentionally wrong data (…) The effects of a small mistake can be alarmingly amplified. When information is recorded in a computer, there is little incentive to delete it, therefore, some records may remain available for a long period of time. Unlike information on paper, data stored in a computer takes very little space and is easy to keep and transfer, so it may last indefinitely". Leonardi, Marcel. Responsabilidade civil pela violação do sigilo e privacidade na Internet. In: Silva, Regina Beatriz Tavares da; Santos, Manoel J.Pereira dos (coord.), *Responsabilidade Civil na Internet e nos Demais Meios de Comunicação* (Saraiva, São Paulo 2007), at 339-340.

[6] Bauman, Zygmunt. Vida para o consumo. Transformação das pessoas em mercadorias. Translation: Carlos Alberto Medeiros (Zahar, Rio de Janeiro 2008), at 8.

considered identifiable.[7]

The social networking websites, regardless of the implications resulting from their users' freedom of speech, which must find justification and reason to exist in the constitutional principles of human dignity (Article 1, III, Brazilian Constitution) and social solidarity (Article 3, I, Brazilian Constitution), therefore, translate themselves into a new kind of data bank.

Initially asking how someone becomes what he or she now is, Paula Sibilia emphasizes the deepness of changes introduced by the popularization of the social networking websites. We are dealing with a new subjectivity, a new form of self-expression, a new formation and delimitation of an individual's personality:

> A sign of these times was anticipated by Time Magazine, which set its usual ritual of choice for personality of the year at the end of 2006. In that issue, the news created echoed through all communication means of the planet, and were soon forgotten with other innocuous data produced and put away every day. The American magazine has been repeating this ceremony for almost a century with the intent to indicate those persons who most affected the news and our lives, for good or bad, embodying what has been most important in the year. No one less than Hitler was elected in 1938, the Ayatollah Khomeini in 1979 and George W. Bush in 2004. Who was elected personality of the year in 2006, according to TIME? The answer is YOU. Yes, you. Actually, not only you, but also me and all of us. Or, to be even more specific, each one of us: the ordinary people. A mirror was shining in the cover of the publication, inviting readers to contemplate themselves in it like Narcissus, happy to see their "personalities" shining in the highest stage of the media (…)
>
> The world wide web became a huge laboratory, a fertile ground for experiencing and creating new subjectivities: (…). However, there is no doubt that these shining spaces of the Web 2.0 are interesting, even more because they seem to be good scenarios for staging an even more strident show: the "self" show (…)[8]

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[7] Regarding the subject, we recommend the text from Stefano Fadda, bearing in mind that the specific command of Directive 97/66/CE, in matters related to protecting private life and personal data within the telecommunications industry, deepens and integrates the general norms of Directive No. 95/46/CE, being applicable to telecommunications services available in public information networks, including the Internet. Cf. Fadda, Stefano. La tutela dei dati personali del consumatore telematico. In: Cassano, Giuseppe (org.), *Commercio Elettronico e Tutela del Consumatore* (Giuffrè, Milano 2003), at 290-291. According to Têmis Limberger, personal data is any information that allows the direct identification of someone. Therefore, its protection is imperious to prevent or eliminate potential iniquities, to avoid its use as an instrument to damage people, and that must occur in its collection, storage or usage only for the correct purposes. Limberger, Têmis, *O Direito à Intimidade na era da Informática*, A necessidade de proteção dos dados pessoais (Livraria do Advogado, Porto Alegre 2007), at 62.

[8] Sibilia, Paula, *O Show do Eu*, A intimidade como espetáculo (Nova Fronteira, Rio de Janeiro 2008), at 27. In the words of the author (*Ibid* at 8), a characteristic of the contemporary society is the hypertrophy of the self, praising the desire to be different and want always more: "Nowadays, megalomania and eccentricity no longer seem to enjoy the qualification of mental diseases or pathologic disorders, as it used to be in the past".

Indeed, in today's consumerist society, everyone is persuaded to treat him/herself as a product. The fetishism of the product is replaced by the fetishism of subjectivity. The show of subjectivity in our society drives individuals to manage themselves as brands, "one of the most required goods, (…) which is supposed to be put under circulation, bought, sold, put away and recreated by the volatile rhythms of fashion".

The so-called virtual social networks nowadays translate the show society, retracted in 1967 by Guy Debord, a philosopher and social instigator whose work has strongly inspired the events of May, 1968, in France:

> The whole life of societies where modern production conditions reign seems to be a huge accumulation of shows. Everything that was directly lived became a representation (…). The show is not a set of pictures, but a social relation between people, mediated by pictures (…) Considered as a whole, the show is simultaneously the result and the project of existing production means. It is not a supplement of the real world or a decoration added to it. It is the core of unrealism in the actual society. Under all its particular forms—information or propaganda, advertising or direct consumption of entertainment—the show is the real dominant lifestyle in society. It is the ubiquitous assertion of the choice already made during production, and the consumption resulting from this choice (g.n.).[9]

The only thing that prevents us from speaking of a new reality or a pseudo world apart is that, in the words of Lawrence Lessig, "the cyberspace is not, of course, a place. You do not go anywhere when you go there".[10] It is a manifestation of the real world, where new subjective existential situations are developed, mostly stimulated by communications means. Otherwise, the legal framework would not be applied to relations developed there.[11]

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[9] "'Subjectivity' in a society of consumers, like 'merchandise' in a society of producers (using the opportune concept of Bruno Latour), is a *fatishe*—a deeply human product raised to the category of superhuman authority by the forgetfulness or condemnation to irrelevance of its over-human origins, together with the set of human actions that brought it up and were *sine qua non* conditions for it to take place." Bauman, Zygmunt, *op. cit.*, at 23.

[10] *Code and Other Laws of Cyberspace* (Basic Books, New York 1999), at 10 e se.

[11] Specifically in regard to the software program *Second Life*, whose users develop activities through characters named "avatars", Sérgio Iglesias Nunes de Souza affirms, suggesting the creation of a virtual court within the environment: "if we adopt the origin reference that *Second Life* will be a totally independent and autonomous world, we will inevitably have to accept a new normative structure(…) On the other hand, in spite of the existing autonomy, we may treat *Second Life* as an extension of the human activity realized in the interactive cybernetic relations. This way the interactivity with Law would be plentiful, although autonomous. For instance, the character or 'avatar' created is nothing else than an extension and form of expression of human conduct and personality, but will never be a person in legal terms(…) The legal regulation must be like an extension of human activity, otherwise we shall miss the center of importance of its interests: the human being". Cf. Souza, Sérgio Iglesias Nunes de, *Lesão nos Contratos Eletrônicos na Sociedade da Informação* (Saraiva, São Paulo 2009), at 338-339.

Bearing in mind the greater factual inequality of those involved, in virtue of the specificity and vulnerability inherent to the mean, the protection of fundamental consumer rights should be intensified through the basic rights emanated from Article 6 of Law No. 8078/90, especially life, health, security (I), education (II), information (III) and the effective prevention and reparation of moral and material, individual, collective and diffuse damages (IV).

The Law cannot ignore these new facts. Within the scope of the United Nations Organization, through Resolution 39/248 of April 16th, 1985, the nature of consumer rights was proclaimed as a human right of a new generation aimed at protecting those in a fragile position in any juridical relation. This is because that the provider is always in the position of owner not only of the production means, but also of the information concerning the contract. Therefore, the effectiveness of equality through public laws is sought as it promotes substantial equality between the parts.

In Brazil, the so-called affirmative protection of the consumer has been constitutionally raised to the category of fundamental right and guarantee (Article 5, XXXVI), being also an economic and financial order principle (Article 170, V) so that those laws must define the consumer's position in the Brazilian constitutional system.[12]

The fundamental right of consumer defense has its roots in the general clause of personal protection, the principle of human dignity (Article 1, III, Brazilian Constitution), whose effects irradiate all over the Brazilian constitutional civil framework.[13]

Therefore, this article aims at facing the peculiarities of this new way of consumer relation, which brings along a pressing need for full and global comprehension of the phenomenon in which it is inserted in order to provide adequate protection to these juridical relations. Thus, we shall proceed to a brief exposure of the Internet outbreak and the challenges it brings to the legal science.

The following question is applied to the Internet in matters of liability for consumer accidents on social networking sites: Do consumer rights apply only to the physical mean through which the information is spread or do they also regulate the informational content?[14]

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[12] Cf. Marques, Claudia Lima; Benjamin, Antônio Herman V.; BESSA, Leonardo Roscoe, *Manual de direito do consumidor* (2nd ed., Revista dos Tribunais, São Paulo 2009), at 26.

[13] Martins, Guilherme Magalhães, A defesa do consumidor como direito fundamental na ordem constitucional. In: _____. *Temas de Direito do Consumidor* (Lumen Juris, Rio de Janeiro 2010), at 1.

[14] Wilhelmsson, Thomas. The consumer's right to knowledge and the press. In: _____.; Tuominen, Salla; Tuomola, Heli, *Consumer Law in the Information Society* (Hague, Kluwer 2001), at 368.

I. THE COMMUNICATIONS REVOLUTION AND THE CHALLENGES OF LAW

The means of communication became very important in the recent history of mankind. Since the improvement of written press, their evolution accompanied the evolution of civilization itself, taking a crucial part in many historical events. Marshall McLuhan and Bruce Powers, analyzing the recent communication history in the 20th century, say the communication means had vital importance in the globalization process for developing a real "global tribe".[15]

Indeed, many of the forecasts came true. Their implementation is largely due to the popularization of necessarily standardizing communication media, such as the television and the radio. The Internet represents a further overcoming moment ruled by interactivity in which the possibility of choices for users is theoretically unlimited. So "if for McLuhan the mean was the message, now the message is the mean. That determines a unique point of view for observing the law itself".[16] There is a tribe, however decentralized.

The communication mean in itself is said not to be a faithful instrument to transmit information. That is because not all the information is subject to be transmitted by any means. There are limits intrinsic to it that are hard to overcome. Words, for instance, bring with them a semantic content, but bear cultural linguistic limits.[17]

The Internet seems to be a powerful form to overcome those limits. Examples are everywhere. The reduction of many forms of knowledge to binary language and the resulting storage in the form of electronic archives through informatics, together with the information transfer protocols that are part of the net show the drastic reduction of transaction costs, helping in the development of new business forms, new company organizing models.[18]

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[15] *La aldea global no es un libro del siglo XIX, Uno con expectativas enciclopédicas; es un libro que nunca tiene la respuesta final, que trae el pasado al presente para poder ver un futuro alternativo, un futuro donde toda la economía parezca moverse rápidamente hacia servicios encomendados individualmente hechos de medida.*" Powers, Bruce R. Preface in Mcluhan, Marshall; Powers, Bruce R. *La aldea global. Transformaciones en la vida de los medios de comunicación mundiales en el siglo XXI* (Gedisa, Barcelona1989), at 14.

[16] Pinheiro, Patrícia Peck, *Direito digital* (3rd ed., Saraiva, São Paulo 2009), at 7.

[17] So communicating would not be simply transferring the information, but also transmitting it through a multiplicative process. In the subject, *see* Luhmann, Niklas, *A realidade dos meios de comunicação.* Translation: Ciro Marcondes Filho (Editora Paulus, São Paulo 2005), at 17.

[18] *Transaction costs*, as studied by both the Economic Theory and the Law, mean generally the costs of negotiating, implementing and executing contracts. Cf. Lorenzetti Ricardo L., *Comercio eletrônico*, Translation by Fabiano Menke with notes by Claudia Lima Marques. São Paulo: Editora Revista dos Tribunais, 2004, at 49 e ss. According to Ejan Mackaay, they include the costs of identifying a potential client and reaching an agreement, seeking a strategic behavior to satisfy the profit expectations. Cf. Mackaay, Ejan, *History of Law and Economics* (University of Montreal, 1999). *Available at* http://www.cdaci.umontreal.ca/pdf/mackaay_history_law.pdf. (last visited Oct. 21, 2009), at 10.

Specifically in consumer relations, all this technical arsenal working for the provider makes an important means of publicity for the products or services it offers, using audiovisual signals whose complexity is increasing and gradually making the consumer vulnerable for his/her complete ignorance of the juridical relations in which he/she takes part.

Cláudia Lima Marques shows the challenges presented to the legal science with the consolidation of this new reality, including the depersonalization of juridical relations when consumers are identified not by traditional ways, but by combined algorithms in the form of IP protocols.[19]

In the words of the author, the consumer is "a 'mute' subject in front of a screen", in a panorama of dematerialization of contracts, represented by bits and binary codes, concluded through clicks mostly induced by chaotic audiovisual stimuli, "full of images, colors, sounds, written reminders, pictures, etc.".[20]

Another important characteristic of this environment is the lack of trust, in an opposite way to the consolidation of the objective good faith principle, of whose essence extracts the protection of consumers' legitimate expectations, guiding the proper application of the Consumers' Defense Code.[21]

As it happens, in the specific scope of contracts, the regulation has already been occurring for a long time, either in the environment of European communitarian law (Directive No. 31/2000), in the uniform law elaborated by the UNCITRAL (United Nations Commission on International Trade Law) of 1996, as well as in the comparative law of many countries like England, US, Germany, Colombia, Argentina, France, Italy, Spain and Portugal, among others, dealing with the proof of contract, electronic signatures and domain names, etc.

Unfortunately, the Brazilian Law does not maintain the legislative rhythm occurred in other countries, and the existence of a special law about electronic contracts would certainly increase the level of consumer protection

[19] Abbreviation of *Internet Protocol*, which determines the addresses of senders and receivers on the web.
[20] Marques, Claudia Lima, *Confiança no comércio eletrônico e a proteção do consumidor*: um estudo dos negócios jurídicos de consumo no comércio eletrônico (Editora Revista dos Tribunais, São Paulo 2004), at 63.
[21] Marques, Claudia Lima, *op.cit.*, at 63.

in view of the environment's specificity. Various bill propositions have been "sleeping" in the National Congress for over ten years, among which we highlight Bill No. 1589/99, which elaborated by the special commission of legal informatics from the Bar Association of Sao Paulo.[22]

Concerning the definition of rights and responsibilities of citizens, companies and the government, the preliminary draft of the bill ruling the Brazilian Civil Rights Framework for Internet Users is being elaborated in a participative way, open to suggestions from the public in general, whose content has been submitted to public discussion in the website http://www.culturadigital.br/marcocivil/.

The bill's initiative came from the Minister of Justice, in a partnership with the Brazilian Observatory of Digital Policies of the Technology and Society Center for the Getulio Vargas Foundation in Rio de Janeiro, which was under public discussion until March 31, 2011. The bill 2126/11 creates in Brazil the first regulatory mark of privacy and treatment of personal data, which are understood as "any information related to an identified or identifiable person, directly or indirectly, including all the addresses or identification numbers of a terminal used for connection to a computer network".

According to the bill, with the exclusion of exceptions specifically indicated, the treatment of personal data can only take place under free, express and informed agreement of the owner, subject to revocation at any time, which can be given in writing or by any other certifiable mean, after previous notification.

However, the bill brings along many polemical aspects, especially in Article 15, which conditions the liability of providers for illegal or offensive content to previous judicial notification. That article, if approved the way it stands now, shall create obstacles to the conduct adjustment terms between the main providers like Google and the General Public Prosecution office,

[22] Digital certificates are specifically regulated by Provisional Measure No. 2.200-2 of September 2001, currently in force (since it precedes the enactment of Constitutional Amendment No. 32, of 9.11.2001), which created the Brazilian Public Key Infrastructure ("ICP-Brasil"), a federal agency destined to guarantee the authenticity, integrity and legal validity of documents in electronic format and applications making use of digital certificates.

and the Prosecution Offices of states such as Rio de Janeiro and Sao Paulo, making it possible to have free access to information about users for criminal prosecution.[23]

Regretfully, the "lobby" formed by the industry's economic operators had an outstanding presence in the discussions about the bill, threatening conquests that were gradually achieved and working against the public interest, especially in the subject of providers' liability, where now the major problems and consumer accidents with social networking websites are seen, above all due to the scope of the rule in Article 17 of Law No. 8078/90, which equalizes consumers to all the victims of the event ("bystanders").

The Consumers' Defense Code, an actual law of principles that has just completed 22 years of enforcement, has reviewed two old dogmas of obligational relations by diluting the frontiers between contractual and extra

[23] Not for another reason, the National Council of General Attorneys of the Public Prosecutors' Office for the States and Union (CNPG) has unanimously approved on May 20, 2010 a technical note raising questions about Articles 14, 16, 20 and 22 of the Brazilian Internet Civil Rights Framework, for considering that those provisions impair the repression to crimes committed through the Internet, particularly those against children and teenagers, therefore contributing to impunity. Article 14 of the proposed bill provides the conservation for only six months of users' registration and connection data. Such a short period of time goes against a term of mutual cooperation executed before public authorities, including the Federal and State Public Prosecutor Offices, together with telecommunications companies and civil society institutions which, considering the average time needed for investigating this kind of tort, established a period of three years for the maintenance of such information. According to the CNPG note, the period reduction "will represent, besides an undeniable retrocession, an encouragement to impunity, for it will make impossible in most real cases to produce the material proof needed to individualize the wrong conduct". The CNPG also raises questions about Article 16, III of the proposed bill, which provides—"Article 16—The protection of access records to Internet services shall depend on express authorization of the user and comply with the following, notwithstanding the other rules and directives related to the protection of personal data: III—data allowing identification of the user can only be made available with a link to access records of Internet services upon judicial order" (emphasis added). According to the mentioned note, that restricts the access to "data which, in the traditional Brazilian legal framework, have always depended on legal measures". Finally, Article 22 provides that "when blocking access to content, the service provider shall be responsible for informing the fact to the user responsible for the publication, advising him/her of the removal notification and giving him/her reasonable time to delete the content forever". Still according to the CNPG note, that provision goes against Article 20 of the Criminal Procedure Code: "the authority shall guarantee in the indictment the secrecy needed for clarifying the fact or demanded by the interests of society". The technical note concludes that "the sale and purchase through the Internet of sexual violence images against children is responsible worldwide for moving nearly US$ 3 billion, according to FBI estimates. Only in the virtual relations site Orkut, specialists estimate the occurrence of 700 crimes of that sort per month, that is, 23 per day or almost one per hour".
Article 20 of the proposed bill will be commented on item 5.2, related to the liability of data hosting providers.

contractual civil liability and making relative the inter parts effect of the contracts.[24]

It is still a subject under construction. In a recent precedent of the Supreme Court, the subject of moral damages resulting from spam, i.e., undesired emails with unsolicited adverts massively sent to consumers, has been faced. This common practice in the virtual environment is criticized a lot by the doctrine, which professes the liability of the offerer for power abuse (Article 187 of the Civil Code), without prejudice to the penalties of abusive publicity (Article 37, paragraph 2 of the Consumers' Defense Code).[25] However, unfortunately, that was not the understanding of the Court. At the time of that decision, declarations of the president of the court, Minister Fernando Gonçalves, were much commented, as he confessed: "I know nothing of computers and would rather keep it this way".[26]

An American education expert Marc Prensky says informatics and telematics, nowadays, have divided the world into two different moments. The stage in which our civilization now is, is in the digital era confronts the past, where knowledge was necessarily expressed through touchable ways.

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[24] Martins, Guilherme Magalhães, *Formação dos Contratos Eletrônicos de Consumo via Internet* (2 ed., Lumen Juris, Rio de Janeiro 2010), at 96.

[25] Summary: Moral Damages. Spam. This is a lawsuit seeking an obligation to do cumulated with an indemnity request for moral damages in which the plaintiff states to be receiving spam emails (women in bikinis) from a restaurant featuring strip tease shows and, even after asking twice for his email address to be removed from the defendant's email list, continued to receive that kind of mail. Among Internet users, "spam" is a denomination for electronic messages of advertisement containing unsolicited adverts of product or service suppliers. The decision favored the request and granted anticipated legal protection so that the restaurant should refrain from sending advertising material, under penalty of a daily fine, and ordering the defendant to pay for moral damages the amount of 5,000 Brazilian Reais, updated by the IPC as from the decision date, plus moratory interests as from the date of the event. However, the Court of Justice provided the appeal of the establishment and reformed the sentence, considering that simply sending unsolicited emails, although with a commercial intent, does not makes up deceitful or abusive advertising to justify the application of CDC norms and there should be no moral damages, since the violation of intimacy, private life, honor or image was not demonstrated. For the Min. Relator, whose vote was defeated, sending emails with advertisement without the consumer's express authorization constitutes harmful activity that may, besides other consequences, generate a collapse of the Internet system in view of the great number of information transmitted through the web, and spam messages would bear high costs to the society. He observed there is no specific legislation for the case of abuses, although there are law propositions being considered in the Congress. Therefore, the CDC would be applicable by analogy. After various reflections on the subject, he recognized the occurrence of damage and the obligation for the restaurant to remove the plaintiff from its email lists, as well as the invasion of the plaintiff's privacy, and as a result he reestablished the sentence. For the winning thesis, inaugurated by Min. Honildo de Mello Castro, there is no duty to indemnify, because there are means for the sender to block undesired spam, as well as tools made available by Internet email services and specific softwares, therefore, he maintained the decision given by the Court a quo. In face of the arguments exposed, the Panel did not provide the appeal. REsp 844.736-DF, Original Relator Min. Luis Felipe Salomão, Rel. for accordance Min. Honildo de Mello Castro (TJ-AP), judged on 10/27/2009.

[26] Source: MIGALHAS n 2.256, 28.10.2009, http://www.migalhas.com.br/ (last visited Dec.17, 2009).

Thus, people are divided into digital natives and digital immigrants. The changes have been incorporated to the culture in such a drastic way that made them irreversible. So there are two possible attitudes to the immigrants, either one of nostalgic regret, remembering "how things were good in the old country"[27], or trying to adapt themselves, gradually losing their "seat", incorporating in their routine the new practices of this new universe.[28]

The complete ignorance about the subject is evident by itself. So we deduct that the vulnerability of the consumer, who has inspired the construction and consolidation of this new area of law, takes even more alarming proportions in the Internet. In other words, the complete lack of information for this huge legion of Web users only shows the great vulnerability of the cyber consumer, whose protection shall be effective only through a higher promotional incidence of constitutional principles, specially human dignity and social solidarity, to promote a balance of strengths for the parts involved.[29]

II. SOCIAL VIRTUAL NETWORKS[30]

Before anything, a social virtual network represents an allegory. It is a structural analysis of a bundle of subjective interconnections. Studies about social virtual networks started in the middle of the 20th century, but its insertion in the current atmosphere of communication means, specially the

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[27] As pointed out by the French Former President Nicolas Sarkozy, in a statement herein considered as double meaning, "selective immigration is put in practice by nearly all democracies of the world", so that "France is able to choose its immigrants according to our needs". Bauman, *op. cit.*, at 12, associates that statement to the selection made by human beings according to the market rule of choosing the best product on the shelf, but nothing prevents the application or such a rule to digital inclusion.

[28] Cf. Prensky, Marc, *Digital Natives, Digital Immigrants* in On the Horizon. MCB University Press, Vol. 9, No. 5, October 2001, at 3. *Available at* http://www.marcprensky.com/writing/Prensky%20-%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part1.pdf. (last visited Dec. 25, 2009).

[29] About the subject, V. Fernandez, Eusébio, *Teoría de la justicia y derechos humanos* (Debate, Madrid 1984), at 43-44.

[30] The virtual social networking concept is comprehensive. As we shall see, the web business models referred to when the expression is used are mostly related to social networking websites. Danah M. Boyd and Nicole B. Ellison point out the main features of social networking websites. These are sites that allow its users to: (1) build a public or semi-public profile in a system where users are somehow permanently linked; (2) exchange information with many users, making their communication possible (3) see and share their contact list and that of other users within the system. Cf. Boyd, Dannah M.; Ellison, Nicole B, *Social Network Sites: Definition, History, and Scholarshi*p, 13 (1) JOURNAL OF COMPUTER-MEDIATED COMMUNICATION, Article 11, 2007. *Available at* http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html (last visited Nov. 21, 2010). In this work, the expressions are used as synonyms.

Internet, enhanced its effects. Generally, they are described by the conjunction of two aspects, according to Raquel Recuero:

> A social network is defined as a set of two elements: performers (people, institutions or groups; the web ties) and their connections (interactions or social ties). So, a network is a metaphor to observe the connections or social group standards, starting from the connections established among the various performers. The network approach therefore has its focus on the social structure, where it is not possible to isolate the social performers and their connections.[31]

First of all, we know that the performers are individuals making interconnections with others. But in social virtual networks, we are talking about a representation, a profile that the user accesses through a personal identification and password, making the information that can individualize him available. The so-called profiles are much more than mere individualized data banks. That is because the performers on social virtual networks are frequently "constructions of themselves" or "narrations of the self". So we are dealing with a representation of reality, extracting elements that sometimes hidden in the person's personality.[32]

The problem must be reached by the Law, as the general order that protects the people imposes the protection of personality in all facets. The so-called personality rights, a dogmatic construction that is now gradually being understood in the category of existential subjective situation, impose protection to the "right to identity", the right of "being oneself".[33] So, Stefano Rodotà says these virtual identities have the same level of protection as any other personality good, inasmuch as they can be violated and, therefore, be subject to indemnity and inhibitory protection.[34]

Regarding connections, although it is said that the Internet brought weakness to the relational ties, what really occurs is the rise of new human relations, fostered and encouraged by the digital environment, showing different ways of convenience and challenging the law operators.

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[31] Recuero, Raquel, *Redes sociais na Internet* (Sulina, Porto Alegre 2009), at 24.

[32] Why is all this that seems so futile worth of attention? (…) We are not talking of futilities without importance, once those capacities are ever so indispensable in order to deal adequately with the others and obtain success in various markets nowadays. These new "ways to be" configured today, trained in the day-by-day routine of screens and keyboards, are more useful and productive for satisfying the demands of our society". Sibilia, Paula, O espetáculo do eu. *in Revista mente e cérebro* February/09. http://www2.uol.com.br/vivermente/reportagens/o_espetaculo_do_eu.html. (last visited Feb. 16, 2011).

[33] Perlingieri, Pietro, *O direito civil na legalidade constitucional*. Translation: Maria Cristina de Cicco (Renovar, Rio de Janeiro 2008), at 760 e seg.

[34] Cf. Rodotà, Stefano, *A vida na sociedade da vigilância*: a privacidade hoje. Organization, selection and presentation by Maria Celina Bodin de Moraes. Translation by Danilo Doneda and Luciana Cabral Doneda (Renovar, Rio de Janeiro 2008), at 116.

That happens, only as an example, in the evaluation related to alimony lawsuits of the binomial question of possibility versus necessity in view of information declared by one of the parts in a social virtual network. In the same way, information from social networks has also been used in employee selection procedures, discussing, furthermore, in family law, the infraction of the marital duty of fidelity as from messages or information circulated on the Web.

Recent rebellions in Egypt, Tunisia and Libya, between January and March of 2011, show the power of social virtual networks, which concentrate a large part of the protests and popular discussions facing totalitarian governments that ended up destroyed.

Another strong aspect of social networks is the formation of an endless contingent of social capital. The subject is very clear in economics, being also a fundamental element for the comprehension of the remuneration form of Web 2.0 services.[35] It is known that, nowadays, there is a noticeable recognition of the intrinsically economic content of social organization forms on the web. Ties developed can be gradually strengthened if put in an atmosphere of trust between the members of a certain community, which only happens with clear, efficient and transparent rules.

It has been said that, in the transformation of the web, one of the most important aspects was the incentive given to the insertion of information by the users themselves, in a participative way. Services were then modified and started to be even more indirectly paid.

Now it is possible to know user preferences by knowing the websites they access, or even the words they search in a search device, for example, creating many "profiles" about the connection data networks. Remuneration

[35] Many are the definitions of social capital, but as from the nineties decade, more importance has been given to the subject as significant criteria for the concession of loans by the World Bank. That institution sustains that: "Social capital reflects the norms that make collective actions feasible. It encompasses institutions, relations and customs that make up the quality and quantity of social interactions. It is fundamental for societies to prosper economically and have a sustainable development. When correctly managed, it is able to increase the effectiveness of projects and their sustainability by strengthening the ability of communities to work together in favor of its common purposes, generating more inclusion and cohesion, increasing transparency and commitment toward results". http://go.worldbank.org/VEN7OUW280 (last visited Dec. 22, 2009). Free translation.

now is no longer calculated by the number of accesses to the website, but by the number of clicks on a certain link (cost per click). This is how advertisement contract prices are calculated through an estimate of potential consumers, specified by the information they put available by themselves, showing their preferences, religions, sexualities, cities where they live, etc.[36] Having said that, it is convenient to define the legal regime applicable to social virtual networking websites.

A. Legal Regime of Virtual Social Networks

Bearing in mind the economic value of the social capital of virtual networks and the information that makes the interactions between profiles, nothing else needs to be said about gratuity of the offered services. Although there are previous decisions in contrary, the maintenance of profiles in social networking websites, even if not directly charged, is remunerated by the advertisement contracts and that makes it an onerous deal, which is in the concept of service of Article 3, paragraph 2 of Law No. 8078/90.[37]

The disparity between providers and members of virtual social networks, on the other hand, is imperious. Besides being induced to buy through aggressive advertising techniques, generally with the help of spam, the consumer is in a condition of vulnerability because he does not know the technical nuances of the relation he is about to enter. In short, the complete ignorance, among other situations, of the legal means to refuse a direct

[36] As an example, we mention the acquisition of 1.6% of the share capital of social networking site Facebook by Microsoft Inc., for the amount of 240 million dollars. The estimated value of the social network, including the assets and legal relations that make up its estate, was calculated as worth 15 billion dollars. Cf. Hamilton, Anita, *Why Microsoft Overpaid for Facebook*, TIME.COM. *Available at* http://www.time.com/time/business/article/ 0,8599,1675658,00.html#ixzz0aT8yYMJ4. (last visited Dec. 22, 2009).

[37] Summary: Civil Liability—Moral Damages—Orkut—Relationship Website—Image Exposure—Text with Pejorative and Defamatory Content. Liability Of the "Owner" and Controller of the Group. Appeal Provided. It is well known that Orkut is a service provided gratuitously with the purpose to encourage its users to create new friendships and maintain relationships. There are millions of users creating "profiles" in order to relate with other registered users, who share and seek information there, and such information is free for access also in other "communities", that is, not only participating users may view their content. So, in case the person offended has his/her image exposed in the gigantic web through the publication of photographs and text aimed at criticizing his/her attitudes and traces of pejorative and defamatory character, the "owner", as the creator and controller of group activities is called, shall respond for moral damages resulting therefrom. (TJMG—Civil Appeal No. 1.0024.05.890294-1/001—9th Civil Chamber—Relator: Des. Tarcisio Martins Costa—04.10.2007) Emphasis added.

offense promoted by a stranger to his image[38], or prevent the creation of a fake profile for unauthorized using of his image[39], or even avoid the maintenance of a "community" of defamatory content[40] illustrate the difficulties found by the consumer about the information in the social networking websites.

We also ask what the object of this consumer relation would be. And the answer is found in the case law itself, which recognizes that websites that maintain such networks, like Orkut, Facebook or MySpace, among others, have their users with a relation of data keeping and availability of access through links. So they act as data hosting providers and thus are subject to the civil liability regime. In that sense, the following decision is made by the Egregious Court of Justice of the State of Rio Grande do Sul:

> SUMMARY: CIVIL LIABILITY. MORAL DAMAGES. INTERNET DATA HOSTING SERVICE PROVIDER. GOOGLE. ORKUT. FAKE PROFILE. FLAGRANTLY UNLAWFUL CONTENT. DUTY TO INDEMNIFY ACKNOWLEDGED. 1. In order to characterize the consumer relation, the service must be rendered by the provider for a remuneration. However, the concept of "remuneration" provided in the mentioned consumer law includes both direct and indirect remuneration. Precedent of the Court in the specific case. 2. Google, as the administrator of the networking website named ORKUT, where it stores information posted by its users, is not responsible for the respective content as it is not obliged to promote previous monitoring of the same. However,

[38] Summary: Orkut—Anticipated Legal Protection—Request Consubstantiated in Exclusion from Virtual Community—Possibility—Offenses Made by Anonimous People Preventing the Plaintiff from Adequately Protecting His Personality Rights—Decision Reformed. Appeal Provided. Bill of Review No. 5621844200. (TJSP—Relator: Neves Amorim. District: Itanhaém. Judicial Court: 2nd Chamber of Private Law. Date of Judgment: 03/24/2009. Date of register: 04/07/2009) (emphasis added).

[39] Summary: Civil Appeal. Ordinary Rictus. Creation of fake profile on relationship website named "Orkut". Legitimacy of Google Brasil. Objective liability resulting from availability of content on the world wide web. The defendant, as manager of the relationship website, allows the insertion of content by its users without any kind of filter or control, which remits the fact to the field of business risks, upraising the objective liability of the defendant therefrom. Moral damage configured. Indemnity quantum correctly established in R$ 10,000 according to the criteria of proportionality and reasonability. Both Apeeals Not Provided. (TJRJ—Appeal No. 2009.001.52083—Relator: Des. Pedro Saraiva Andrade Lemos—Date of Judgment: 09/30/2009—10th Civil Chamber) (emphasis added).

[40] Summary: Anticipated Legal Protection—Obligation to Do—"Orkut"—Publication in Virtual Community of Offensive Content to the Plaintiff's Honor—Decision Maintained—Bill of Review Not Provided. The allegations made by the defendants appear to be truthful, founded on documented proof indicating that the relationship website "Orkut" publicizes offensive content to the plaintiff's image. Proposing to make the service available, it shall be attributed to the defendant the burden to prevent the maintenance or creation of communities with vexing purposes to the plaintiff, and it may not allege technical impossibility to interfere with the site's contents. With unanimity of votes, provision was denied to the bill of review. (TJPE—Bill of Review No. 165004-8—Relator: Desembargador Leopoldo de Arruda Raposo—5th Civil Chamber—Date of Judgment: 3/26/2008) (emphasis added).

> in case there is a complaint for abuse from a user, it has the duty to remove a profile that is flagrantly false and capable of generating moral damages. Omissive and guilty behavior that corresponds to a defective provision of service, as it did not offer the security it could legitimately be expected to provide. 3. Moral damages in re ipsa, resulting from the facts narrated and demonstrated in the lawsuit. APPEAL PROVIDED.

B. The Consumer at Risk. Liability of Hosting Providers and the "Notice and Takedown" Rule. Criticism of the Treatment Given to the Matter in the Draft Bill Proposition Named "Marco Civil da Internet"

More than preventing victims to be unreimbursed, the civil constitutional logic of principles that has its meaning and reason in the dignity of the human being (Article 1, III, Brazilian Constitution)[41], is directed to the need to guarantee everyone the right to avoid being a victim of damages.

In parallel to the space already occupied by the reimbursement of damages occurred, whose monopoly ceases to exist, the principle of precaution comes up[42], driven to the previous elimination (before the damage is produced) of the risks of damage, being of great importance for that the imposition to do or refrain from doing certain obligations, established in Article 84 and respective paragraphs of the Consumers' Defense Code, and in the Civil Code, Article 247 and following, all very much influenced by the Civil Procedure Code, especially in its Article 461 and paragraphs, implying a trend to keep the patrimony out of civil liability.

The removal of offensive information, as well as its rectification, or, possibly, the withdrawal by the responsible, among other obligations to do or refrain from doing, has great importance in this damage elimination technique.

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[41] Dignity, for the purpose of the aforementioned rule, may be understood as the instrument conferring to each one the right to be respected which is inherent to the quality of a human being, as well as the intention to be put in suitable conditions to exert his own personal aptitudes, taking the positions corresponding to them. Perlingieri, Pietro, *Perfis do Direito Civil*. Translation: Maria Cristina de Cicco (Renovar, Rio de Janeiro 1997), at 37. Ingo Wolfgang Sarlet defines the human person's dignity as "(…) the intrinsic and distinctive quality recognized in each human being that makes us deserve the same respect and consideration from the State and the community, implying in that sense a set of fundamental rights and duties that assures the person against any act of degrading and inhuman character and comes to guarantee the minimum existential conditions for a healthy life, besides promoting and propitiating our active and co-responsible participation in the fate of our own life in communion with other human beings". Sarlet, Ingo Wolfgang, *Dignidade da pessoa humana e direitos fundamentais* (4th ed., Livraria do Advogado, Porto Alegre 2006), at 60.

[42] Viney, *Droit civil*, *op.cit.*, at 57.

Given that there is a consumer relation in the social network, which has relations of content hosting of data furnished by the consumer, either as words, images and so, on the objective civil liability regime applies in its entirety for the fact that the product and the service are present in the Consumers' Defense Code.

Bruno Miragem says that the liability regimes of Internet providers, although they may have a variation according to the applicable rule, are equal in regards to the consequences of its application. Even in non-consuming private relations ruled by the Civil Code, in many cases the habitual activity is capable by itself of causing responsibility for the risk of the activity, in the words of the unique paragraph of Article 927 of the Civil Code. Therefore, they cause damage risks to others, approaching "sensitively the liability regime for damages imposed to service providers by the Consumers' Defense Code".[43]

On the other hand, part of the doctrine sees it differently, backed by a certain confirmation from case law.[44] They are supported by the absence of the so-called general duty of vigilance by the Internet service provider. First of all, in the foreign legislation, the Article 15, firstly disembodied from Directive 2000/31 of the European Community, a group of rules that deal with market relations related to the Internet, preview an exclusion clause of the providers' general duty of vigilance in relation to its users.[45]

Furthermore, in the United States, the Telecommunications Decency Act of 1996, which brings up a set of legal concepts about the Internet and establishes strict punishment for those responsible for publishing content not only illegal, but also morally reprehensible through the Web. It also

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[43] Cf. Miragem, Bruno, Responsabilidade por danos na sociedade da informação e proteção do consumidor: defesas atuais da regulação jurídica da Internet. *Revista de Direito do Consumidor*. Ano 18. n. 70. Abr-jun./2009 (Revista dos Tribunais, São Paulo 2009), at 51.

[44] Part of the doctrine raises questions about the existence of user's privacy on virtual networking websites: "The question proposed here is if there is, then, a right to privacy for users of such a system: well, the answer to that is even simplistic since, in that format, there is not any subjective privacy right (sic) for users as the data they upload is available to anyone—including photographs that may be copied by any Internet user without any scope of protection. The adopted format allows any user to write messages on his/her page and on other users' pages, creating internal or external links to other pages, so that anyone adhering to the site is fully conscious of what may happen and the security they may expect. Any conduct to be put in practice within relationship websites belongs exclusively to its users, being unreal to have the intention to submit its keeper to objective liability because, if that was to occur, it would make the format unfeasible. Binicheski, Paulo Roberto, *Responsabilidade civil dos provedores de Internet* (Juruá, Curitiba 2011), at 246.

[45] 1. Member States shall not impose to providers for the supply of services mentioned on Articles 12, 13 and 14 a general obligation of vigilance over the information they transmit or store, or a general obligation to search actively for facts or circumstances indicating civil wrongs. The aforementioned articles deal exclusively with liability.

enunciates rules that exempt providers from the "duty to intensively watch its users", later called "general vigilance duty" by the Europeans.[46]

The consideration, although for exclusion or denial, of a general vigilance duty, more than a retrocession towards guilt, in the risk era, seems harmful to consumers, given the constitutional hierarchy of consumer rules.

According to this point of view, the hosting provider only would be responsible if, notified about the presence of illegal material in the website, whose excessive delay would result in damages and common liability with the offender. In that sense, Marcel Leonardi says:

> It may be noticed therefore that the liability of hosting providers for illegal acts is subjective, resulting only from an eventual omissive conduct, imprudence or negligence, with the application of Article 186 of the Civil Code. The responsibility only shall be invoked if the ISP and the hosting service providers, warned about the illegal content of the page, insist in keeping it.[47]

The exclusion is supported by the notice and takedown rule, originated in the American legal system. It seems to go against the new tendencies of civil liability today, of abandoning the focus in the damage caused in favor of repairing the damage suffered, a natural consequence of the proper irradiation of the constitutional axiological tablet.[48]

The current wording of Article 15 of the proposed bill of the Brazilian Internet Civil Rights Framework takes away the great virtue of the notice and takedown rule, that allows the service providers to get to know the existence of illegal material in its servers and remove it with no need for specific judicial steps with the same purpose. In the age of alternative ways to solve conflicts, the Brazilian Civil Rights Framework for Internet Users

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[46] Sec. 230. Protection for Private Blocking and Screening of Offensive Material (…) (1) Treatment of Publisher or Speaker—No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider. (2) Civil Liability—No provider or user of an interactive computer service shall be held liable on account of (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1). Federal Communications Commission, *op. cit.*, online.

[47] Leonardi, Marcel, Responsabilidade civil dos provedores de serviço de Internet (Juarez de Oliveira, São Paulo 2005), at 176. In the same sense, Sônia Aguiar do Amaral Vieira, for whom the liability of hosting service providers shall always be subjective, being necessary to investigate the guiltiness. Cf. Vieira, Sonia Aguiar do Amaral, *Inviolabilidade da vida privada e da intimidade pelos meios eletrônicos* (Juarez de Oliveira, São Paulo 2002), at 145.

[48] Martins, Guilherme Magalhães, *Responsabilidade civi…*, *op. cit.*, at 306-307.

as it is now, sends to courts questions that were already solved through faster instruments, like conduct adjustment terms.[49]

The unrestricted importation of the American rule would imply praising the proof onus in detraction of the consumer, disrespecting the imperative rule of Article 51, VI of the Consumers' Defense Code. So the consumer would depend on the provider to make available a mean of notification, which would imply, according to Stefano Rodotà:

> Not the consumer as receiver of the information, but the consumer as maker of the information, with a promotional character, like in the case of advertisements, where in a certain moment the voice says: "if you don't want the information received together with this sales order to be transferred to others, please block this postal Box"; evidently, in this case, the consumer receives the attribution, as provider of information, of the right to control the mode of circulation of his own information.[50]

In view of the technical and informational vulnerability of the consumer on the Internet, it seems as an excess to condition the provider's liability to a previous act of the consumer, which also affronts the constitutional principle of free access to Justice (Brazilian Constitution, Article 5, XXXV).

Regarding offensive contents via Orkut, recent decisions of the Superior Court give rise to concern, written by Minister Fátima Nancy Andrighi, who has always been prominent for her votes towards the substantiation of consumer rights as fundamental rights.

In the judgment of Special Appeal No. 1.193.764, where the decision failed to declare the Internet provider liable for damages for considering that, notwithstanding the obvious existence of a consumer relation in the service provided by Orkut, Google's liability should be restricted to the nature of its activity within the website. According to that vision, regarding content supervision of the information posted by each user, that is not an intrinsic

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[49] The original reading of Article 15 of the Brazilian Internet Civil Rights Framework, favoring the administrative notification of providers, was the following: "Article 15—Internet service providers may only be liable for damages resulting from content uploaded by third parties in case they are notified by the offended person and refrain from taking measures to make unavailable, within the scope of their service and in a reasonable time, the content pointed out as offensive. First paragraph—Internet service providers must make ostensively available at least one electronic channel dedicated to receiving notifications and counter-notifications. Second paragraph. It is allowed for Internet service providers to create an automatic mechanism in order to attend the procedures provided in this Section". Now the proposed new reading of Article 20 states as follows: "Internet service providers may only be liable for damages resulting from content uploaded by third parties if, after receiving a judicial order in that respect, they refrain from making unavailable within the scope of their service and in a reasonable time the content pointed out as offensive".

[50] Rodotà, Stefano, Persona-consumatore. In: Stanzione, Pasquale (coord.), *La tutela del consumatore tra liberismo e solidarismo* (Edizione Scientifiche Italiane, Napoli 1999), at 26 (free translation).

activity of the service provided, thus it is not possible to repute defective, at least in terms of Article 14 of the Consumers' Defense Code, a website that does not examine and filter the material uploaded.

The best solution goes the opposite way, based on Articles 12 to 14 of CEE Directive No. 31/2000, because, where there is control, there must be liability. From the moment the provider interferes with the communication, originating it, choosing or modifying the content, or selecting the receiver, it may be considered liable, because the insertion of offensive contents is an internal matter, that is, a known risk intrinsic to its enterprise.

Therefore we conclude, based on Article 14 of the Consumers' Defense Code, that the liability for the fact of the service of the website owner where there are links with sensitive users' data is objective, because they use this huge aggregate of information to obtain their profits from gigantic advertisement contracts and, above all, because they retain the technical means of individualizing the real causers of the damages. For that purpose, bystanders can be considered as victims of the damage event.

Regarding the utilitarian opinions in favor of providers and the technical impossibility to maintain capable instruments to avoid such damages, this is not the best explanation to the problem. It is because that in a mass society where damages are distributed among the agents by the risk management of their professional activities, nothing seems more correct than the pulverization of eventual costs along the price of advertisement contracts and, if necessary, even the securitization of possible future damages.

In the conflict between freedom of speech for the author of the damage[51] and dignity for the victims, the latter will always have precedence, specially if we observe the constitutional hierarchy of consumer rights (Brazilian Constitution, Article 5, XXXII and Article 170, V).[52]

The social function, as an internal limit inspired by the human person's dignity (Article 1, III, Brazilian Constitution) and by social solidarity (Article 3, I, Brazilian Constitution), imposes that service providers seek, within its economic activity, meta-individual interests linked to the whole society in order to make their autonomy and freedom of speech deserve the protection of civil constitutional rights.

A substantial part of case law has been inclined towards that solution.

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[51] Thomas Wilhelmsson reminds us that, even though it is a fundamental right, a basic requisite for an open and democratic society, the freedom of expression encounters many exceptions, specially in matters of advertisement, where regulation is allowed. Wilhelmsson, Thomas, *op.cit.*, at 371.

[52] Martins, Guilherme Magalh ães, *Responsabilidade civil por acidente*…, *op.cit.*, at 297.

In the words of Minister Antonio Herman Benjamin, in his important vote about blocking relational pages and communities for posting offensive material:

> The Internet is by excellence a space of freedom, but that does not mean it is a lawless universe, opposed to any liability for abuses that may occur there. In the real world, just like in the virtual one, the value of human dignity is unique, and neither the mean in which the aggressors transit, nor the technological devices they use may change or weaken the unrenounceable, untransferable and indefeasible nature of super principle given to it by the Brazilian Law.
>
> Those who technically make it possible, economically benefit and actively stimulate the creation of communities and relational pages in the Internet is as responsible for the control of eventual abuses and for the guarantee of the personality rights of web users and others as the web users themselves, who generate and disseminate offensive information against the most important values of life in community, in real or virtual terms.
>
> This dual responsibility—part of the social commitment of modern companies with society, under the excellence of the services it provides and deserved admiration it has all over the world—is accepted by Google, so much that it has performed decisively to delete pages and identify virtual gangsters. These options are obviously insufficient for repressing certain offensive pages already created but doing nothing to stop the rising of many others with the same or equal content is theoretically the same as stimulating a Tom and Jerry game, which does not cure, but only prolongates the situation of exposure, anguish and helplessness of offense victims.

Minister Luiz Felipe Salomão, in the judgment of Special Appeal No. 1.175-RS, considered, in view of the traffic of defamatory texts in the relational website Orkut, that the so-called technical incapacity to delete incontrovertibly offensive messages would be a *venire contra factum proprium*, unopposable against the Internet provider, as:

> If the so-called absence of capable devices to monitor the virtual environment called Orkut was believable, this "technical deficiency" would be part of the large liberal mechanism of access to this social network, which certainly attracts more users and makes profits possible (…) Data hosting providers are liable for controlling the messages disseminated and must attend judicial determinations to remove defamatory content within the stipulated time.
>
> The absence of technical tools does not exempt the company from trying to find solutions, for if Google created an uncontrollable monster, Google itself has to be charged for the occasional consequences generated by its users' lack of

> control. Offensive messages could be captured by programming devices or by an specialized technical body.[53]

That is a polemical subject and the Supreme Court has recognized general repercussion in the constitutional question raised by the Extraordinary Appeal (ARE) No. 660861, interposed by Google Brazil. The subject deals with the duty of hosting providers to supervise the published content and remove it when considered offensive, with no intervention of the Courts. The company says that the condemnation by the Court of Minas Gerais results in previous censorship, as it determines that the hosting website must supervise information disclosed on the Web. As asserted, this would violate the freedom of speech, the right to information and the principle of jurisdiction reserve to the judiciary, which would be solely capable of making a judgment of value over contents filled with subjectivity.

CONCLUSION

The social networking websites' boom allows people to exercise a new subjectivity, marked by a new formation and delimitation of existential situations, bringing also new opportunities for the occurrence of damage.

The human dignity is an irremovable reference for preventing and repairing damages resulting from conducts such as fake profiles or disclosure of offensive material, so that it always has to be above the freedom of speech of those who cause damage.

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[53] Special Appeal No. 1117633-RO, 2ª t, j.09.03.2010, in summary: "Civil Procedure. Orkut. Public Civil Action. Blocking of Communities. Ommission. Non-Occurrence. Internet and Dignity of Human Persons. Daily Fine. Article 461, paragraphs 1 to 6 of the CPC. Absence of Offense(…) 9—The Court of Justice in Rondonia did not decide conclusively in relation to the technical possibility of this efficient control of new pages and communities. It only decided that, in principle, there was no evidence of the company's impossibility to prevent them, which was the reason for a daily fine. As indicated by the Court, the burden of proof belongs to the company, both as depository of the specialized knowledge it employs and as holder and beneficiary of industrial secrets not available to the victims or the Public Prosecutor's Office, 10—In that sense, the Court made clear that the company shall have the opportunity to produce the evidence it considers convenient for the court in first instance, specially regarding the impossibility to prevent the creation of new similar communities or those already blocked. 11—Special Appeal not provided".
According to a fragment of the reasoning for the aforementioned vote, "It is not even the case of previous censorship to the users' freedom of expression in the so-called social networks. As a matter of fact, the Federal Constitution, when proclaiming the freedom of expression and manifestation of thought, does so by tracing the directives and logical principles according to which that right shall be exerted, so there is not, particularly or as a rule, an absolute right. Indeed, the third paragraph of Article 222 (Brazilian Republic Constitution) somehow directs and restricts such freedom by asserting that 'the electronic communication means, regardless of the technology used for rendering the services, must observe the principles enunciated on Article 221', where respect for ethical and social values of the person and family are highlighted (item IV)".

The rule of notice and takedown from American Law cannot be imported without criticism, without considering the Brazilian reality and the constitutional status of consumer defense, which is a fundamental right and a general principle that conforms the economical order, so that the treatment of the subject in the draft of the Brazilian Civil Rights Framework for Internet Users deserves a bigger reflection for the regulation of Internet in Brazil. Otherwise, it shall be instituted an inversion of the burden of proof in detriment of the consumer, in a clear affront to the rule of Article 51, VI, of Law No. 8078/90.

The civil liability of social networking service providers for damages to human people resulting from the mean is objective, in the terms of Article 14 of the Consumers' Defense Code, in such a way that it cannot admit the absence of a general vigilance duty, otherwise it would be a retrocession towards guilt right in the middle of the risk era.

THE LEGACY OF HARVARD PROFESSOR RONALD DWORKIN FOR THE CIVIL RIGHTS MOVEMENT: WHY AND HOW HE CHALLENGED PHILOSOPHERS OF LAW, SUPREME COURT JUSTICES, AND POLITICIANS TO TAKE RIGHTS SERIOUSLY

Joseph Osei[*]*, Linda Tomlinson*[**] *& Paul Boaheng*[***]

> The weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves.
>
> (Dworkin: 1977, p. 199)[1]

Although Professor Dworkin is not listed among those who marched with King or defended him in Court, we will argue in this paper that through his teachings at Harvard, Oxford, and NYU etc. and his publications and public discourse, he has made a lasting contribution to the Civil Rights Movement. For example, he challenged not only his colleagues but Supreme Court judges and politicians to take rights—including human rights and civil rights—seriously. Towards our objective, we will examine his rejection of legal positivism by which the validity of any law depended on its source and discuss its implications for laws of segregation in the South. We will also discuss his theory of law as integrity in which judges interpret the law in terms of consistent and communal moral principles that uphold human dignity. Next, we will discuss his theory of equality based on the belief that human beings are responsible for the life choices they make and the fact that natural endowments of intelligence and talent are morally arbitrary and ought not to affect how limited resources are distributed in society. Additionally, we will discuss his "Right Answer Thesis" in the light of "Judiciary Discretion" as an alternative. Here, our focus will be on the theory's implications for justice and fairness, and especially for civil rights. Finally, we will discuss these theories and their implications for defending the Civil Rights and the Civil Rights Movement as well as Affirmative Action in the light of recent attacks on it by Professor Pojman who rejects it

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[1] Dworkin R., *Taking Rights Seriously*, MA (Harvard University Press, Cambridge 1977).

as reverse discrimination as well as the attempt by Justice O'Connor and Justice Brennan on how to rescue it by appealing to the Diversity Principle. In the discussion session, we will examine the implications of this theory for sustaining the Civil Rights Movement into the middle of the 21st century.

INTRODUCTION

Although Professor Dworkin's name is not listed among the heroes that marched with Rev Dr. Martin Luther King Jr. or defended him in court in the 1960's, we will argue in this paper that through his decades' teaching at Yale, Harvard, Stanford, Oxford, and NYU etc. and his publications and public discourse, he has made a lasting contribution to the Civil Rights Movement that needs to be not only acknowledged and widely discussed, but also enhanced and utilized for social justice and social transformation for this and future generations.

Towards this objective, we will examine Dworkin's philosophical rejection of the Theory of Legal Positivism and discuss its implications for Laws of Segregation in the South. We will also discuss Dworkin's Theory of Law as Integrity and focus on the theory's implications for Civil Rights as well as for justice and fairness. We also plan to discuss his Theory of Equality and its implications for teaching, advocating and defending Civil Rights and for seeking social justice through the Civil Rights Movement into the middle of the 21st century. Next we will discuss his "Right Answer Thesis" in opposing judicial discretion and examine its consequences for Civil Rights. Finally, we discuss his contribution to provide moral and legal justification for Civil Disobedience, and for Affirmative Action against those who reject it as a form of reverse discrimination. As a preparation for these discussions, we think it would be useful to provide a brief biographical account of Professor Dworkin from a historical perspective.

I. WHO WAS PROFESSOR RONALD DWORKIN?

Reflecting on the life and legacy of Professor Ronald M. Dworkin after announcing his sudden death on February 14, 2013, the *Guardian* observed, "[H]e was widely respected as the most original and powerful philosopher of law in the English-speaking world".[2] With reference to his books, articles and lectures in the classroom and through public media, in London, Boston, and New York etc. for decades, *The Guardian* credits him with developing a powerful, scholarly interpretation of the law, and expounding critical comments on national and global issues.[3]

The topics ranged from how the law should deal with race, abortion, euthanasia, to equality from the perspective of classical liberal philosophy. The paper also gives him credit for articulating these philosophical and legal issues in ways that ordinary people would not only understand but would be able to appreciate the value of law as based on moral virtue. Within his own field, where law and philosophy meet, the *Guardian* states, "his reputation was unsurpassed and almost unrivalled".[4]

Professor Dworkin, who the *Guardian* rightly presents as a liberal public intellectual and legal philosopher, was born on December 11, 1931 in Providence Rhode Island to Madeline Talamo and David W. Dworkin. For his undergraduate studies Dworkin went to Harvard University where he earned B. A. in Philosophy. Following this, he went to Oxford University as a Rhodes Scholar and earned an M. A. in jurisprudence.[5]

An early indicator of his academic excellence and critical thinking acumen was noted when Oxford academic officials were so impressed with his scholarship that they asked the Chair of Jurisprudence [H. L. A. Hart] to read his thesis. Subsequently, Dworkin returned to Harvard Law School to complete a L.L.B. in 1957 and later served as a clerk to Judge Learned Hand of the United States Court of Appeals for the Second Circuit. After passing the bar in 1959, Dworkin worked briefly for Sullivan and Cromwell—a

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[2] *Guardian* 02/14/2013.

[3] Dr. Linda Tomlinson who is a professional historian and a scholar of the Civil Rights and Black Power period comments that Dworkin seems to be more tolerant of some low level of violence as part of Civil Disobedience in contrast to the purists who insist that any type of violence disqualifies a political protest to be considered as Civil Disobedience. "This is exactly what Dr. King and others in the Civil Rights Movement called on their participants to do—disobey and/or break laws. It didn't matter whether the participants were of the Nonviolent Direct Action (King, et al.); the Armed Self-Defense (Robert Williams et al.); Litigation (N Affirmative Action CP Legal Defense Group); "By Any Means Necessary" (Malcolm X et al.); or the Proactive Militancy (The Black Panther Party et al.) methodologies—they were participating in acts of Civil Disobedience.

[4] The Guardian Newspaper, London, UK.

[5] 2006, *World Philosophers & Their Works*, February 2000, at 1-3.

New York law firm although he never showed interest in becoming a courtroom lawyer. His interest was in research and teaching and he eventually became a Professor of Law at Yale Law School and the holder of the Wesley N. Hohfeld Chair of Jurisprudence. This academic appointment, which promoted teaching and scholarship, allowed him the flexibility to marry his two passions in law and ethical philosophy. The opportunity also gave him the freedom to work on issues he found interesting such as issues of race, justice, freedom and Civil Rights.

Given his intellect, passion and commitment, Dworkin's academic career soared quickly. He published a critique of utilitarianism in the *Journal of Philosophy* (1963)[6] and was consequently promoted to Professor two years later. His critique of Legal Positivism, discussed in this paper, was published as "Is the Law a System of Rules" (1967). This publication established his status as a genuine philosopher of law. Subsequently, he was appointed as professor of law at NYU in 1975, while simultaneously teaching courses and seminars at other prestigious institutions including Harvard, Stanford, and Cornell.[7] Many of these institutions appointed him as visiting professor or invited him to give special talks and lectures. Dworkin's expertise in applying philosophical analysis to current legal and political issues evolved during these academic exchanges and made him well-known and respected globally as a professional and public philosopher.[8]

Dworkin became intrigued with controversial issues especially those emanating from the United States Supreme Court. His obvious liberal orientation became evident as he consistently endorsed the Court's liberal decisions while rejecting their conservative decisions. Not surprisingly, he clashed with Republican politicians whose ideas about women's rights, civil rights, abortion, court-ordered busing for desegregation and Affirmative Action policies were degrading to women and minorities. Notwithstanding the strong opposition from conservative politicians and thinkers, Dworkin actively sought to influence public opinion by speaking frequently at major universities and by publishing articles intended for a broad public in *The New York Review of Books*.[9]

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[6] *Journal of Philosophy*, 1963.
[7] *World Philosophers*, 2000.
[8] In 2006, The New York University Annual Survey of American Law honored Dworkin as well as the Legal Research Institute of the National Autonomous University of Mexico. The University of Buenos Aires awarded him an honorary doctorate and in November of 2011, he received the Balzan Prize for Jurisprudence in Quirinale Palace, Rome from the President of it.
[9] *The New York Review of Books*.

Against all odds, he kept to his liberal philosophy on Civil Rights especially Affirmation which he feared might be struck down by the new set of right-leaning Supreme Court. Commenting on the recent Fisher versus The University of Texas case in 2012 he wrote:

> I believe that affirmative action is of great value to American society generally, but the five ultraconservative Supreme Court justices are widely expected to seize this opportunity to outlaw it…
>
> (Dworkin, Dec. 20, 2012)

His seminal book, *Taking Rights Seriously (1977)*, is a collection of articles analyzing philosophical problems and legal issues—the two intellectual loves of his life. His defense of a "liberal theory of law" (which is discussed further in this paper) is the unifying glue for these articles. His later writings were responses to criticisms carefully crafted by expounding and refining various aspects of the theories found in his first book. In the second book, *A Matter of Principle*,[10] he discusses the issue of Affirmative Action (also discussed in further details below), which had taken center stage in legal circles in the 1980's as they do now in the 21st century. Dworkin became an outspoken advocate for Affirmative Action policies as evidenced by his defense of Justice William Brennan's interpretative approach in the case, *United Steelworkers of America v. Weber (1979).*

In another work, *Law Empire*, Dworkin personified law as though law has consciousness and reflects on the nature of "law beyond the law". He declared: "The courts are the capitals of law's empire, and judges are its princes".[11] Although most of his work centered on issues in the United States, Dworkin also examined issues in the United Kingdom. *A Bill of Rights for Britain* (1990)[12] argued for the European Convention on Human Rights to be incorporated into Britain's domestic law, giving British judges the power of judicial review. His idea of "communal democracy" is embedded in this push for judicial review.

Dworkin's later works contrast his earlier ones because he no longer rejects a generic right to liberty. He refines his interpretative theory in *Freedom's Law*, where he deals with the concept of a "moral reading". Dworkin was awarded the Holmberg International Memorial Price for:

> [E]laborating a liberal egalitarian theory and his effort to develop an original and highly influential legal theory grounding law in morality are characterized by

[10] Dworkin, Richard, *A Matter of Principle*, MA (Harvard University Press, Cambridge 1985).
[11] Guest, Sweet, *Ronald Dworkin*, 1991.
[12] Dworkin Ronald, *A Bill of Rights for Britain*, Issue 16 of Chatto & Windus, The University of Chicago, 1990.

> a unique ability to tie together abstract philosophical ideas and arguments with concrete everyday concerns in law, morals and politics.[13]

After the publication of *Taking Rights Seriously*, Professor Dworkin became one of the most influential philosophers of law. Later events have shown that he wrote at the right moment in time: A time when change in America and around the world was on the horizon. Social and political struggles such as Vietnam War and the Civil Rights Movement were the catalysts for the change to come.

II. PROFESSOR DWORKIN ON TAKING RIGHTS SERIOUSLY

Any political constitution worthy of its name, Dworkin argues, must take rights seriously. First, the constitution exists primarily to protect the people or the rights of the people for whom it was designed. In particular, Dworkin holds that the rights of its vulnerable citizens should be of paramount interest. Unless rights are understood as "trump cards" or stringent rights requiring strong protection, he warns, the rights of minorities and other vulnerable groups will be marginalized or trampled upon in order to secure the happiness or benefits of the majority. Utilitarians for example, may think such actions are justified since they presume to maximize happiness for the majority, but that cannot be morally acceptable since they undermine human dignity.

Appalled by such political practices in the New England area when he visited America to appreciate at first hand their democratic experiment in the 1820's, the French Philosopher, Alexis de Tocqueville, did not hesitate to express his disappointment with the type of government he observed in New England. In his judgment, the state he observed in New England was neither a representation nor a reflection of a model democracy, but rather "The Tyranny of the Majority".[14] Agreeing with Tocqueville assessment, Professor Dworkin states that no government that takes rights seriously will allow their government to degenerate into "The Tyranny of the Majority".

The minimal standards for any government to avoid this political tragedy, he surmised, can be reduced to two principles. First, the government must defend the principle that treating people in ways that are inconsistent with recognizing them as full members of the human community are profoundly unjust. This requirement is based on the Kant's Human Dignity Principle that requires that no one should be treated as a

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[13] HIM Prize, 2007.

[14] Tocqueville, Alexis, *The Tyranny of the Majority*, Democracy in America (University of Chicago Press, Chicago 2000).

mere means to an end but always as an end. Ensuring that none of its citizens is treated in a degrading manner should therefore be considered an imperative for every government.[15]

Second, the government must uphold the principle of political equality. This he explains is an important principle because it makes it imperative that the weaker members of a political community should receive the same concern and respect of their government as the more powerful members have secured for themselves. He recommends that governments that claim to take rights seriously and are consequently determined to avoid "The Tyranny of the Majority" must accept both of these principles, or at least one of them. We cannot agree more with Dworkin on this equality principle given that it is enshrined in the US Constitution as the equal protection clause or article.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, without due process of law, nor deny to any person within its jurisdiction, "equal protection of the laws".[16]

The significance of this Amendment and Dworkin's equality principle to Blacks and all other minorities cannot be exaggerated. It is fundamental and critical to defend all aspects of Civil Rights including the right not to be discriminated against regarding voting rights, the judiciary system, the educational system, and the right to work. By defending these rights therefore Dworkin was providing protection for Civil Rights for all people including minorities.

III. WHY AND HOW PROFESSOR DWORKIN REJECTED LEGAL POSITIVISM

What is Legal Positivism? It is an offshoot of the dominant theory or movement of analytic philosophy in the first half of the 20th century called Logical Positivism which states that the meaning of a proposition consists in its method of verification. Accordingly, Professor Dworkin defines Legal Positivism as the legal theory or movement that maintains that the truth of a legal proposition consists in facts about the rules that have been adopted by specific social institutions. This implies that individuals have legal rights but "only in so far as they have been created by explicit political decisions or

[15] Boss, Judy A., *Racism and Affirmative Action*, Analyzing Moral Issues (McGraw-Hill, Boston 2005).
[16] US Constitution, Amendment XIV Civil Rights Section 1.

social practice". It denies the validity of any legal right prior to the approval of such an institution. Jeremy Bentham, one of the first philosophers to defend this theory, castigates human rights and natural rights which have no such institutional foundation as "nonsense on stilts".[17] For Bentham, only legal rights are real rights since they actually express the will of the sovereign and their anticipated maximum benefits.

The Harvard Philosopher of Law, H. L. Hart improved upon Legal Positivism by drawing a distinction between two types of rules. The first represents the content of law depicting what is legal or illegal to do while the second rules represent a form of meta-rules or the rules that govern the formulation of the first rules and their interpretation and application. The improvement did not, however, alter the core belief that having an institutional origin is a sufficient condition for the legitimacy of law. In other words, notwithstanding Professor Hart's improvement, Legal Positivism continued to maintain that the rules of governments should be accepted as legally binding provided they have been adopted or ratified by some *de facto* or actual institution as law. This implies that the patently inhumane and unjust laws of Apartheid South Africa for example, (prior to the dismantling of the apartheid system) should be considered valid since they were approved by the all-white South African Parliament. Further it implies that Black South Africans including Mandela who disobeyed them deserved to be prosecuted for their actions. Such a political system does not take (moral) rights seriously. If it did, it would first ask what moral right the all-White South African legislature whose parents or ancestors had illegally occupied the land and imposed their laws on the majority and indigenous Black people of South Africa had. By the same token or analogical reasoning, we have to infer that Southern Blacks would be breaking the law unjustly if they disobeyed the patently unjust "Jim Crow Laws" or the Laws of Segregation in the South prior to the mid 1960's since they were based on the will of the white majority in the South. Consequently, Legal Positivism is logically incompatible with the principle of Civil Rights and by implication, the Civil Rights Movement.

In order to justify or rationalize their laws, some Legal Positivists who claimed to be (moral or economic) Utilitarians attempted to justify it on Utilitarian grounds. They argued that obeying those laws is necessary for the social and economic wellbeing of the general community. However, as Professor Dworkin maintains,

[17] Bentham, Jeremy, *Utilitarianism*, UK.1816.

> Balancing the public interest against personal claims is not the correct model (of law), if we take rights seriously (since) that would be leading democratic society into a form of Tyranny of the Majority.

Having rejected Legal Positivism for the foregoing reasons, Dworkin presents his argument in defense of rights. Unlike the Utilitarians, he does not base his argument on the laws' consequences for the majority or on the will of the ruling authorities. For him, the validity of the law depends on how well it protects and promotes the moral and political rights of the people. Consequently, he argues "If the government does not take rights seriously, then it does not take law seriously at all".

Given that the dominant legal theory of the US has been Legal Positivism, issues that were not covered by law were left to the discretion of the judges. This allowed judges of the period of segregation to rationalize Black lynching and other forms of Black oppression in the South in the name of stability. Since the White majority, including most of their judges and political leaders already biased or racist in their attitudes towards Blacks, the political atmosphere that prevailed can only be described as "Tyranny of the Majority". A good example of Southern political leaders who were pleased with the *status quo was* George Wallace, the Governor of Alabama, who screamed in the face of Civil Rights Leaders and the national media: "Segregation now, segregation tomorrow, segregation forever!"[18]

What is worse, Legal Positivism also holds that overall welfare of the society is a function only of the welfare of distinct individuals and not of distinct groups or communities. Consequently, it denies any distinct community as an entity has any independent interest or entitlement. The implication is that in case of any rights violation, only the rights of individuals can be recognized but the collective rights of any distinct community such as women, Blacks, or sanitation workers or veterans protesting against discrimination or fighting for social justice could not be recognized even in principle. Responding to this legally and morally unfair consequence, Professor Dworkin rightly criticized Legal Positivism and the political system that sustains for being too individualistic:

> The weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves.

Unless Legal Positivism modifies this individualistic orientation, it is hard to see how it could be reconciled with the Civic Rights of any civic group. Indeed the collective demands of the victims of slavery, segregation

[18] Wallace, George, "Inaugural Address" by Governor of Alabama, January 14, 1963.

or racism for compensatory justice in a democratic society like America could not be honored. Dworkin did not only expose these unconstitutional and unfair consequences of Legal Positivism, he also challenged its individualistic consequence by emphasizing the importance of group compensation. Dworkin argued that if compensating members of an oppressed group were wrong, then the US government would be wrong in compensating Japanese-Americans who were interred during the Second World War. By the same token the German government's reparations to the survivors of Nazi Concentration Camps would be wrong morally as well. Since of course such actions are moral imperatives demanded by compensatory justice they are not wrong; the inescapable conclusion therefore is that Legal Positivism must be wrong.

In short, Dworkin believes that race or gender can have moral significance just like individuals. If some individuals have been mistreated because of their membership in a group, then he argues they have the right to be compensated by virtue of their membership of the abused group. For this reason, he explicitly supported policies that remedy or provide compensatory justice for Blacks and similar oppressed minority groups who still suffer from the long-term economic and psychological consequences of slavery, segregation, discrimination and intimidation. Dworkin's support for Civil Rights then is not only implicit in his moral or legal philosophy but also explicit and applicable to concrete policies or actions. We will have more to say on this issue later.

Professor Dworkin also rejects Legal Positivism for being too rationalistic. The conceptual aspect of this legal theory holds that laws are the product of deliberate and purposeful decisions by people who carefully reason through several options to arrive at decisions which they believe will change the community (for the better), provided they are followed by general obedience of the people concerned. He points out that the normative part of the theory commends the laws made by the authorities under such conditions and therefore presupposes that the people in office have the skills, knowledge, and leadership virtues necessary for making such vital decisions under conditions of considerable uncertainty in highly complex or diverse communities.

The implication of the normative aspect of the dominant Legal Positivism theory for Civil Disobedience is bound to be devastating, but is not hard to determine. If the laws are made by the most rational and morally superior elites in the society (as the law makers suppose), then it is implied or at least strongly suggested that the laws must be perfect or at least the best laws they are morally and rationally capable of producing at the time.

Therefore no member of the society has any legitimate reason to question the rationality or morality of such laws. Civil Disobedience therefore has no place in such a society, since in principle; it questions the rationality or morality of the law makers. It also implies that calling on citizens to disobey any of the laws set by the authorities concerned—presumed to be rational—while believing in the rationality of the leaders reveals a logical inconsistency in their thinking and hypocrisy in their behavior.

We therefore agree with Dworkin in rejecting the Logical Positivist theory. The right to disobey unjust laws is not only rational given human fallibilism or imperfections, but is also a fundamental right of individual citizens as well as civil societies. Any society that takes rights seriously as articulated by Dworkin will therefore respect and not deny or diminish the rights of its citizens to utilize civil disobedience and similar nonviolent methods in pursuit of more freedom and justice for all of her people, including its minorities and other vulnerable populations.

IV. PROFESSOR DWORKIN'S DEFENSE OF RIGHTS AS "TRUMPS"

A "right" is an entitlement we all have as members of society to choose to do as we please or want without interference from the society or any one, so long as we pose no threat to others. These typically include our individual liberties or freedoms.[19] This definition is consistent with Mill's no-harm principle or libertarian principle.[20] Rights vary and for his arguments Dworkin classifies them into two basic types: moral rights and legal rights. While legal rights are rights given by some distinct legal entity such a parliament, congress, or a similar body with legislative powers, moral rights are independent of any social institution or legislative body. Since individual natural or human rights are moral rights, their ontology or existence is logically prior to membership in any legal entity like the state.

Moral rights are therefore not rights we have by virtue of proclamations by any government or state, but by virtue of who we are as moral beings. Dworkin explains that we need to be treated with care because as humans:

a) We have sensitivity to pain and suffering as well as frustration, and

b) We deserve to be treated with respect and dignity by virtue of our natural ability or potential to reason as rational and morally responsible beings.

[19] Flew, Anthony, *Dictionary of Philosophy*, 1984.
[20] J.S. Mill, *On Liberty*, UK, 1859.

Professor Dworkin does not only reject Legal Positivism, he also constructs and defends an alternative theory of law: "Law as Integrity". It is a rights-based theory that makes the protection of the fundamental or social rights of people the primary condition for any law in place of just having a social basis as Hart, Han and other Legal Positivists maintain. He articulated and defended his new theory of law in the most highly acclaimed of all his books, *Taking Rights Seriously* (1977), against the dominant theory of law as well as a new theory of justice which had just been introduced by John Rawls, a fellow Harvard professor of philosophy.

Defending his theory of law based on moral rights, Dworkin argues that judges should interpret the law in terms of consistent and communal moral principles that uphold human dignity. As a consequence, a government that takes rights seriously must treat those whom it governs with care and concern given our nature as human beings vulnerable to pain, suffering, and frustrations. More importantly, he also adds from a Kantian moral perspective that all humans must be treated with respect, by virtue of our ontological status as human beings capable of forming and acting on intelligent conceptions of how our lives should be lived. Further, recognizing the importance of moral equality, he also argues like Rawls, that governments must not only treat people with concern and respect, but also "with equal respect and concern". The later part of this imperative, is significant as a call for equal treatment of Blacks and Whites and in the light of the promise of equal protection in the US Constitution for all American citizens.

This moral conception of right articulated by Professor Dworkin is significant for defending and sustaining both human rights and Civil Rights. This is especially true when it is linked to the liberal conception of equality. An important implication from his theory of right is that government must not distribute goods or opportunities unequally on the grounds that some citizens are entitled to more because they are worthy of more concern.

His theory of law therefore clearly implies the injustice of the laws of segregation in the South and elsewhere including (former Apartheid) South Africa.[21] They both presumed the concerns and interests of Whites were more important than those of Blacks. For example, the Laws of Segregation were shown to be unfair on this theory since they allowed White citizens of Southern states to vote but denied Black citizens of the same states the same right. Equally unfair were the laws that created insurmountable impediments for Blacks to vote. One notorious example of such impediments was the

[21] History.com, 2013.

condition that a Black citizen who wanted to vote had to be able to define *Habeas Corpus*; an obscure legal term in Latin used mostly by legal professionals. The implicit discrimination in insisting on this as a necessary condition for approving Black applications for the right to vote becomes explicit as soon as we recognize that their Southern White counter-parts were allowed to vote without any comparable impediments or harassment.

Professor Dworkin's theory of right has many other significant implications for Civil Rights. For example, it also allows us to criticize the unequal manner in which Blacks and White citizens of New Orleans were treated in the aftermath of Hurricane Katrina in 2005. The federal government failed to rescue the vulnerable minority populations in the low-lying and poor neighborhoods of New Orleans when Hurricane Katrina threatened and eventually hit the city at Category 5 killing about 1,200 people; not counting their physical, emotional, and financial hurts as well as the number of homes and businesses lost. It is no exaggeration to say that the vast majority of those abandoned were Black, poor and aged women. Even if it could be proven that those abandoned or left behind were the less educated citizens, the injustice would still be unacceptable because according to Dworkin, government must not constrain or limit liberty on the ground that one citizen's conception of the good life is nobler or superior to another's.

Another important moral principle relevant for the protection of Civil Rights introduced by Professor Dworkin relates to the limits of political powers. He argues that governments that treat their minorities unjustly cannot be governments that take rights seriously. Writing in 1977, 29 years ahead of the New Orleans disaster and the political fiasco that followed it, Professor Dworkin expresses his disapproval of such social injustices when he stated as a matter of principle:

> [T]he weaker members of a political community are entitled to the same concern and respect of their government as the powerful members have secured for themselves.

Professor Dworkin is concerned that neither the political left nor right in the US government takes rights seriously in the way they deal with individual and minorities rights. Both sides, he argues, assume wrongly that the ruling theory of law (Legal Positivism) has an exaggerated notion of individual rights. Rights for him are not absolute in the sense that they cannot be overridden by more stringent rights or duties. Borrowing a metaphor from the poker game to describe his conception of rights, he holds that "rights" are "trumps" (or like trump cards) that individual citizens have against their governments. That is because he thinks even the collective goal

or the well-being of society is not (usually) a sufficient justification for denying the right holders what they wish to do as individuals, as long as they don't threaten harm to anyone.

In *Taking Rights Seriously*, Professor Dworkin refers to rights as "trumps" precisely because he believes that rights are "trumps" with respect to ordinary matters of utility, gain or loss. However, like the intuitionist W. D. Ross (1939)[22], Dworkin allows that extraordinary social costs or conflicts with competing rights may sometimes justify overriding or setting aside some rights.[23] At the same, he maintains that rights are not so lame that the government can ignore or trample over them as it pleases without just cause. The few exceptions will include certain extreme or emergency cases such as times of clear and imminent danger or war. In the interest of the appropriate moral and legal balance, he also clarifies that rights being trumps does not mean that the government has a sufficient justification for imposing some loss or injury upon citizens just for asking that they should be respected or protected.

Reflecting on Dworkin's legal and philosophical orientation, Godfrey Hogdson observes that Dworkin rejected both the traditional view that judges must conform to established authority, and the belief of American liberals, that judges should seek to improve society. Hogdson adds that Dworkin placed a new emphasis on the judge's responsibility to uphold individual and collective morality.

The implication from this observation is that Professor Dworkin's conception of rights is not just different from that of the political left and the political right, it is superior to both. This is evident for example, in how he deals with the issue of the Ku Klux Klan (KKK) and the law. Both politicians of the right and the left think US law or the Constitution does not allow the government to ban the KKK or control their acts of intimidation or terrorism against Jews and Blacks when, for example, they burn crosses in front of Black Churches or Black homes. The typical response from both the left and the right when Blacks complain such acts of intimidation or terrorism, Dworkin observes, is that such actions are expressions of their free speech, and are therefore permissible under the First Amendment.

Professor Dworkin is unhappy with this interpretation of the First Amendment as an excuse for the unjust KKK activities. He challenges this interpretation of the right to free speech, arguing the Constitution does not justify taking this or any right as an absolute right. If it were, then there should be no law against screaming "Fire! Fire!" in a crowded theatre where

[22] Ross, W.D., *The Right and the Good* (Clarendon Press, Oxford 1993).
[23] Dworkin, *ibid*, 1977.

there is no fire. There is a law however against such unwarranted screaming and similar unreasonable acts in the name of free speech. Such limitations on their right to free speech by the government are justified because as he argues, "Government may override that right when necessary to protect the rights of others".[24]

That being the case, we agree with Professor Dworkin that the government should be able to ban KKK cross burning in front of Black churches or Black houses and reject the appeal to free speech in this context as untenable rationalization. In short, any government that takes rights seriously cannot ignore the rights of Blacks or any innocent victims of KKK intimidation and terrorism to live freely without intimidation or harassment. Their rights to these values trump the right of KKK or similar terrorist groups to perform these rituals of intimidation in the name of free speech.

V. DWORKIN'S RIGHT-ANSWER THESIS VS. JUDICIAL DISCRETION

Legal positivists, including HLA Hart, maintain that since right answers in legal and moral dilemmas cannot always be determined, judges should have discretion in resolving moral and legal issues. To rebut this argument, Dworkin contends that in every situation where people's rights are controversial, the best interpretation should involve what he refers to as the "Right Answer Thesis".

Broadly understood, the Right Answer Thesis says that in dealing with virtually all legal cases, including the so-called hard cases where there is obvious disagreement over what the law requires, it is always possible to discover principles to solve them. Dworkin's "right answer thesis" was a direct response to Hart's argument on judicial discretion. In opposition to Legal Positivists in general, and Hart in particular, Dworkin contends that when deciding cases in law, lawyers and judges are required to identify general principles that underlie and justify the settled law and then apply those principles to the case at hand. Dworkin maintains that since virtually every legal question that arises has a uniquely right answer, judicial discretion is unacceptable. For Dworkin, judges are always constrained by law in the sense that there are standards which all fair-minded judges are obligated to adhere to including finding a legal or moral justification for their judgments.

The implication of Dworkin's right answer thesis is not hard to determine. If judges can exercise judicial discretion in adjudicating moral

[24] Dworkin, *Taking Rights Seriously*, Morality and Moral Controversies (John Authur ed., Prentice Hall, NJ 1993), at 409.

and legal issues, then they themselves are above the law. Consequently, no one has any legitimate reason to question the legality and morality of laws they legislate based on their legal discretion. This implies that citizens cannot legitimately question even laws that apparently infringe upon the rights of citizens. In short, saying that judges have judicial discretion is almost tantamount to saying that they have license to do what they will.[25]

In Dworkin's view, if judges were unfettered law makers, they would predictably make and remake arbitrary laws to promote their own interests as well as the interests of the most powerful in society to the detriment of minorities and other vulnerable citizens. This will embolden already biased and racist judges to violate the rights of Blacks and other minorities with impunity. So interpreted, the doctrine of judicial discretion runs afoul of Dworkin's theory of justice, according to which political judgments ought to rest ultimately on the injunction that, all people are equal as human beings before the law, irrespective of their individual circumstances. Thus, Dworkin's Right Answer Thesis, is meant to promote the notion that the interests of each member of the community matter equally. It is therefore a very powerful tool for promoting and defending Civil Rights of minorities among other values.

VI. WHY AND HOW PROFESSOR DWORKIN DEFENDS CIVIL DISOBEDIENCE

You would think that 60 years after Dr. King led the Civil Rights Movement to achieve some of its pivotal legislation using the nonviolent direct action method of Civil Disobedience, all the leading philosophers, legal scholars, political scientists and leading politicians etc. would be convinced of its moral and legal status. But that's not always the case. There are many conservative scholars including Legal Positivists, libertarians, and conservative leading politicians who still maintain that it is always wrong to disobey the law or the government irrespective of the consequences. If these people had their way, all acts of civil disobedience would be abolished and the Civil Rights Movement abolished or denied their right to disobey the government or break any law in the name of free speech or civil disobedience.

[25] We are grateful to our colleague Dr. Paul Boaheng who did part of his graduate school research under a Canadian expert on Dworkin and articulated this "Right Answer Thesis" and its relevance to the judicial process or adjudication. More contemporary cases such as Trevor Martin Vr. Zimmerman in which the latter has been freed after killing unarmed Black teenager, the Case of a Black African Woman who has been sentenced to 20 years for firing a warning shot to free herself from her abusive husband to sentencing a 49 year-old teacher convicted of raping 14 year old school girl in her class to a mere 30 days in prison, clearly show that it is unjust to permit judges to use their judicial discretion. Like other humans they are not beyond corruption or prejudice, bias and even racism.

Professor Dworkin did not only hold the opposing view of these people but stood his ground and defended the right all citizens, including Blacks have to engage in civil disobedience. He also defends the Civil Rights Movement in terms of the strong rights that citizens have against their government. Furthermore, he defends this right against those political Utilitarians and others who think that the government is always right in prohibiting Civil Disobedience in the interest of the general welfare. As he eloquently argues:

> A government that professes to recognize individual rights must dispense with the claim that citizens never have a right to break its law, and it must not define citizen's rights so that they can be (easily) cut off for supposed reasons of the general good.

A right against the government, he explains, must be a right to take an action even when the majority thinks it would be morally wrong or even when the consequences would make the condition of the majority worse-off. According to the Professor, we (as citizens) have annihilated the strong moral right of the individual against a government if the government overrides a moral right (supposedly) for the general benefit or other interests of the majority and we consider the government justified in so doing instead of objecting to it in public. For him, if we take rights seriously, then we must reject the stereotypical utilitarian model of "balancing the public interest against personal claims" since as we have pointed out earlier, it would be as appalling as allowing democracy to lapse into a form "The Tyranny of the Majority Fallacy".

Is Civil Disobedience then always right or wrong? Professor Dworkin concedes that reasonable men arguing in good faith can disagree on whether a person who thinks he has a (moral) right against the government actually has that right which could justify his intention to break the law. The activist must also take into account various potential consequences of his/her action on the community; how much, if any violence, harm, or violations of others' rights are anticipated. He thinks this right against the government is so strong that the only valid exceptions would be extreme cases such as when the action will destroy or threaten to destroy the community.

Professor Dworkin also has a counter-argument against those who use the Slippery Slope Argument to oppose Civil Disobedience. They reason that allowing one instance of Civil Disobedience will always lead to a whole series of acts of disobedience, and crimes that will ultimately create chaos no matter how well-organized and how much training the activists have received in preparation for the event. In response, he argues that he knows of no genuine evidence to the effect that allowing some Civil Disobedience

out of respect for the moral position of its authors "will increase such disobedience, let alone crime in general".[26] For emphases he adds, "any society that claims to recognize rights at all must abandon the notion of a general duty to obey the law that holds in all cases".[27]

On the contrary, Dworkin believes that tolerance for Civil Disobedience will (ultimately) benefit the community as a whole. For example, it will increase respect for officials and most of the laws the government promulgates, or at least, slow down the growing disrespect for the laws and today's politicians. He believes that a sincere (democratic) government will not give any harsh treatment like those that Civil Rights activists had to endure in the South. In spite of this optimism, he is quick to warn: if any (democratic) government adopts or tolerates harsh treatment of Civil Disobedience activists, "it should be considered as evidence against its sincerity".

VII. HOW PROFESSOR DWORKIN DEFENDS AFFIRMATIVE ACTION AGAINST THE CHARGE OF REVERSE DISCRIMINATION

Affirmative action (Affirmative Action) has been defined by the US Commission on Civil Rights as:

> [A]ny measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future.[28]

If we separate the Affirmative Action principle into two and refer to the first part where it prohibits discrimination as "weak" Affirmative Action and the 2nd part where it aims at correction, compensation or prevention as "strong" Affirmative Action following the example of Professor Louis Pojman in recent years, it will help us to appreciate better Professor Dworkin's contribution to the preservation of Affirmative Action.[29] We will quickly discover that Dworkin defends and promotes not only weak Affirmative Action which is less controversial, but also strong Affirmative Action like the case of De Funis, which is the more controversial form. Weak Affirmative Action refers to the Civil Rights Act that prohibits all forms of discrimination based on race, gender, religion, and nationality and promotes programs aimed at encouraging and supporting more Blacks

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[26] Dworkin 1977, at 196.
[27] *Ibid*.
[28] *U.S. Commission on Civil Rights*, October,1977.
[29] Pojman, Louis, *The Case against Affirmative Action*, 12 INTERNATIONAL JOURNAL OF APPLIED, 97-115 (1998).

financially to study toward college and access the high professions.

Strong Affirmative Action on the other hand, seeks preferential treatments for Blacks and recommends setting aside certain percentages, targets, or (absolute or flexible) quotas to be met within certain time limits. Predominantly white corporations and businesses that fail to comply voluntarily are sometimes ordered by court to set aside absolute or inflexible percentages or quotas in the name of compensatory justice. On the basis of the 1964 Civil Rights Act proposed by J. F. Kennedy and passed by President Lyndon Johnson, the law permits such strong Affirmative Actions to be used when necessary to enable more Blacks and other minorities to gain access to college and universities, professional schools, hiring for employment, and in the awarding of contracts on account of their long history of deprivation and discrimination.[30] Dworkin explicitly disavows Penman's claim that strong Affirmative Action is simply a form of reverse discrimination which is unfair to more qualified white males who are passed over because of their race.

To give force to his argument in favor of Affirmative Action, Professor Dworkin cites the 1945 case in which a Black student named Sweat applied to the University of Texas Law School. Although he was undoubtedly qualified, University of Texas Law School refused to admit him on the grounds that the state law makes it illegal to admit non-White students. Ruling over this case, the Supreme Court concluded that the law Texas Law violated Sweatt's rights under the 14th Amendment to US Constitution which provides that "no state shall deny any man the equal protection of the law".

Not only does Dworkin support this ruling by the Supreme Court in favor of Sweatt and the weak form of Affirmative Action (or WAA), he also presents arguments in defense of the strong Affirmative Action (SAA) which critics regard as reverse discrimination against Whites and therefore unjust. The critical test on his position emerged when in 1971 a Jewish student, De Funis applied for admission to Washington Law School and he was rejected although his scores and grades were high enough to grant him admission if he had been Black or a Latino or a Native American since these minority groups did not have to score as high as their White counterparts to qualify. Therefore, De Funis and his attorneys argued that it was not only

[30] It is important to note that this policy was not initiated by President Lyndon Johnson but rather by President J.F. Kenney who articulated it in a 1963 speech but was assassinated before he could implement it. Johnson who succeeded Kennedy acknowledged this publicly in his introduction to the promulgation of this policy as an Act in 1964. He described the Act as the best way to honor the legacy of President Kennedy. (*See* www.wikipedia accessed 09/10/2013).

morally wrong to use racial classification in admission as a criterion and so since he had not been given equal protection, De Funis' 14th Amendment right as a citizen had been violated.

Responding to this charge of reverse discrimination, Professor Dworkin argues first that the right of De Funis to be admitted to law school, based on his qualification, is not absolute. "De Funis does not have an absolute right to a law school place, nor does he have a right that only intelligence be used as a standard for admission." In other words, his right to a place in the Law School is not a right that cannot be overridden by other considerations that the Admission Board may justifiably agree on. Such a consideration could be using race as a criterion to offer Blacks more opportunities for upward mobility as part of the attempts being made nationally to compensate them for their history of oppression and deprivation or to maximize diversity within the student community and in the top professions and thereby provide more effective role models for young Blacks. Second, he argues that De Funis and his attorney are confusing two different interpretations of the 14th Amendment or "equal protection" under the law. The two interpretations according to Dworkin are:

1) Citizens have the right to "equality of treatment" under the law; meaning every citizen has the right to equal distribution of some burden, opportunity or resource such as one person one vote.

2) Citizens have the right to "treatment as an equal" under the law which is the right to be treated with the same respect and concern as every other citizen.

Based on this analysis, Professor Dworkin argues that De Funis is not entitled to equal treatment in the first sense since (as a Jew) he's not part of the group being compensated by the Affirmative Action policy for past or ongoing slavery, racism, segregation, or intimidation.

He also argues that De Funis is entitled to "treatment as an equal" as provided in the 2nd interpretation. In this 2nd sense however, the argument continues, "his right has not been violated". That is, because the Admissions Board considered his rights or interests against the competing rights of other students and the duties of the Government, the state of Texas, and the University's Academic Board to add other criteria that might promote the mission of the school. Such criteria in principle could include the provision of remedy or compensatory justice for Blacks and other previously oppressed or disadvantaged minorities.

Dworkin's essential point in dealing with the De Funis and similar strong Affirmative Action cases is that having high grades or superior academic credentials does not necessarily mean that one is going to be the

most qualified in one's field. For example, having high grades does not necessarily mean that De Funis would be a better lawyer than blacks with lower academic grades. Thus, if in the best judgment of the school officials we need to increase the number of potential black lawyers—because blacks are more likely to seek legal assistance from someone of the same race—then race, rather than academic merit, should be one of the considerations for seats in law school. Clearly, Dworkin's argument aims at refuting SAA's critics' argument that school officials should admit the best (academically) qualified candidates. As we have seen, his argument in favor of SAA rests upon his premise that no one has the right to be judged solely on their (academic) merits. While De Funis himself may not be responsible for the harm historically done to blacks and other minorities, he has no constitutional right to prevent the most effective measures of mitigating racial injustices in society.

We agree with Professor Dworkin that Affirmative Action is not just for prohibiting discrimination, but also for remedying or providing compensatory justice for Blacks and similar minority groups who still suffer from the long-term economic and psychological consequences of slavery, segregation, and intimidation from lynching and KKK cross-burning etc. President Johnson was emphasizing the need to provide some level of compensatory justice for Blacks and similar groups when he deployed the Argument from Analogy to support the more powerful Civil Rights Act of 1964. In justifying this Act, which was bound to be controversial in the light of its permission for Courts to set aside quotas or percentages and other progress markers, President Johnson argued:

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say you are free to compete with all the others, and still believe that you have been completely fair.[31]

President Johnson's statement goes beyond treating Blacks as equals when it comes to admission or job hiring. It actually allows or justifies giving helping-hand to Blacks and other minorities that is not available for Whites. So it should be classified as Strong Affirmative Action (SAA) as suggested by for analytic purposes by Louis Pojman 1998. The most controversial issues pertaining to Affirmation have been those of the SAA type which Pojman and other critics call "reverse discrimination" against Whites by-passed for less academically qualified minorities.

As a consequence of these attacks by Pojman and others, it appears the

[31] *U.S. Commission on Civil Rights*, October, 1977.

weight of the Compensatory Justice Argument has been slipping in more recent years in favor of the Diversity Argument. While granting that the Diversity Argument had helped to sustain the Affirmative Action Program since the De Funis Case, Professor Dworkin still worried—as we do—that it was not strong enough to withstand any vigorous challenge by conservative and libertarian judges He is unhappy that defenders of Affirmative Action have been forced to fall back to classroom diversity as shorter-term goal. Justice Powell offered it in place of the more powerful right to remedy or compensatory justice argument.[32] Now that Justice Sandra O'Connor who confirmed and defended the Diversity Argument has retired, Dworkin feared as we do for the future of the Program. As he rightly points out, the Diversity Argument for Affirmative Action is a fragile defense because it offers only vague standards. Secondarily, he argues that although diversity in the classroom is useful for intellectual purposes, no one can claim a right to diversity. If applicants really do have a constitutional right to color-blind standards, he maintains, it would be hard to find a state interest sufficiently compelling to override that constitutional right.

In other words, if conservative judges are able to convince the majority in the Supreme Court about the right to a color blind admission policy, it will be construed as a strong right that will override diversity and thus end Affirmative Action even before the year 2028 projected by Justice O' Connor. Professor Dworkin's concern for the Program as well as for Civil Rights in general is best expressed in an editorial he wrote for the *New York Book Review* on December 20, 2012, barely 14 months to his death. He wrote that Affirmative Action was of great value to American society generally but he worried that the five ultraconservative Supreme Court justices will likely seize every viable opportunity to throw out the Diversity Law. Citing the case of the Chief Justice John Roberts in support of his argument, he quoted Roberts as saying in 2012, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race".[33]

We could not agree more with Professor Dworkin for two reasons. First, the Diversity Principle as a legal or moral imperative cannot be a right, especially an entitlement right such as the right to compensation for previous harm. Second, clever but mischievous educators could create the façade of diversity on campuses without benefiting African Americans, the legitimate community for Affirmative Action as compensation. This can be done strategically by admitting more continental Black Africans from

[32] *The Court and the University*, The New York Review of Books, May 15, 2003.
[33] *The Case Against Color-Blind Admissions*, New York Times Book Review, December 20, 2012.

Kenya, Nigeria or Ghana for example, as students or by appointing many qualified Black Africans as assistant, associate or full professors. However well-intentioned, this strategy cannot be in fulfillment of the promise of Affirmative Action given that the program's primary beneficiaries are not continental Africans, but African Americans by virtue of their historic experience and membership within the community to whom compensatory justice is due.

While in principle a colorblind society and mode of distribution are ideal. Dworkin rightly maintains, it is premature to call for it at this time. As long as racial hatred or prejudice and discrimination exist in a society along side various indexes of economic, professional, and health inequalities or disparities, the society cannot legitimately claim to be ready for wholesale color-blind laws and policies. In agreement with Professor Dworkin we consider the colorblind—model as ideal, but it is not the right model of distribution if we are aiming at minimizing socioeconomic inequalities as a means to distributive justice for all Americans. Affirmative Action, although race-based and therefore not color-blind, is not unjust given that it is a model of distribution that ensures that Blacks and other victims of previous or current injustices have a fair chance at the limited opportunities for medical, legal, and other high professional schools.

We agree with Professor Dworkin's arguments for sustaining Affirmative Action for other objective and fair reasons. The principle behind this model of distribution is the same as that which justifies paramedics who set up triage as a means to distributive justice. Morally speaking it permits them to spend more time and other limited resources on those who need it most to survive, compared with the rest who could survive a longer time without it or are unlikely to benefit from any medical assistance. The rationale behind this mode of distribution is morally analogous to Aristotelian theory of justice as reparation and to John Rawls' theory of justice. They are all aimed at justice as fairness based on need or other legitimate entitlements.[34]

Further, it is important to note that an individual's right to be treated as an equal has many important implications for national policies. For example, it implies that the persons' potential loss (of educational or professional opportunities) must be treated as a matter of concern in our determination to treat each person with equal dignity and respect. It also implies that even when we acknowledge that individual rights are "trumps", individual loss

[34] RAWLS, JOHN, A THEORY OF JUSTICE (Harvard University Press, 1971).

may nevertheless be outweighed by the gain to the community as a whole in a few instances. The overall gains include the short and long term benefits of preferential treatments regarding college and university admissions being given to Blacks. For example, while giving the country the opportunity to offer significant compensatory justice for Blacks, it will also increase the number of urgently needed Black educators and Black role models for Black youth, especially our young Black males who are generally at risk of becoming trapped in the (non-reforming) prison system through recurring recidivism.[35]

The Affirmative Action Program has succeeded to a large extent and will continue to benefit the whole country if sustained for more decades. The Program has increased and will continue to increase the level of diversity which has been associated with increased capacity for problem-solving, innovation, and creativity among students and faculty etc. for school and colleges, top level professions like law, engineering and medicine. As it continues to help increase the number of highly educated and professionally trained Black civil servants, business executives, university professors, professional researchers, military leaders, and mature political leaders for overall socio-economic improvement, it will maximize the wellbeing of the whole country and others globally.[36] The evidence for this optimism is already noticeable among the most successful African Americans that Eugene Robinson has described in his book *Disintegration: The Splintering of Black America* (2011) as the "transcendent". They include General Collin Powell, Dr. Condoleezza Rice, Supreme Court Justice Thomas, Attorney General Eric Holder, Oprah Winfrey one of the wealthiest and most successful business women in the world. The transcendent' class is followed by the "middles class", and the "emergent" being recent college-educated immigrants from continental Africa and the Caribbean and their children. The only group that has not benefited much from Affirmative Action are those Eugene terms, the "abandoned", mostly less-educated, poor, and emotionally unstable African Americans.

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[35] Telling the Whole Truth about Juvenile Incarceration Rates …, http://juvenilejusticeblog.web.unc.edu/2013/03/26/telling-the-whole-truth-about-juvenile-i (last visited Mar. 26, 2013). While a new report finds that juvenile incarceration rates are declining in the United…incarceration rates in the United States, although still highest among industrialized…don't reduce recidivism or increase public safety and expensive. In 2011 black youth were approximately 26% of the total juvenile prison system.

[36] Pojman, Louis, *The Case against Affirmative Action*, 12 INTERNATIONAL JOURNAL OF APPLIED, 97-115 (1998).

VIII. FURTHER DISCUSSION

In spite of all these potentially demonstrable benefits for Strong Affirmative Action, we think Professor Dworkin's responses to De Funis and similar White students whose admission or employment opportunities are lost to Blacks is not good enough. His first response is "the disadvantage to applicants such as De Funis is, on this hypothesis, a cost that must be paid for a greater gain…" In addition to this apparent utilitarian argument, he also maintains that their concern has been taken care of since they received treatment as equals in the process of decision-making.

While agreeing with Professor Dworkin that Defunis has no right to prevent the most effective measures of securing compensatory justice (through Strong Affirmative Action) from being used, we agree with critics like Pojman that White students like Bakke, De Funis, and Gruttas are being made to carry undue or unfair burden of the whole country in the attempt to provide compensatory justice to deserving groups. The burden here has misled some philosophers like Pojman into calling Strong Affirmative Action (SAA) "reverse discrimination", as if the denial of admissions to these victims of Affirmative Action were intended as favoritism to Blacks while denying the opportunity to academically better qualified Whites for no relevant reason.

Being paid a well-deserved compensation based on the history of injustice suffered by one's ancestors or parents is not discrimination in the moral sense of the term. Discrimination effectively defined by John Boatright as singling out a person (or groups of persons) for adverse treatment merely because of their race, sex or other irrelevant factors.[37] Thus, you have discrimination only when you treat people differently based on an irrelevant criterion, but that certainly is not the case in Affirmative Action in which the relevant criterion is not color as such but the historical experience of slavery segregation and other forms of injustices targeting African Americans.[38]

Whites or any other groups that were not victims of the said injustice therefore have no legal or moral grounds for complaining about reverse discrimination. While they are not getting equal treatment with Blacks by virtue of the Affirmative Action Policy, this does not imply that they are consequently the victims of reverse discrimination. Since presumably racial

[37] Boatright J.R., ETHICS AND THE CONDUCT OF BUSINESS (Prentice Hall, Upper Saddle N.J. 1999).

[38] Velasquez, Manuel, *Business Ethics, South Africa, Southern Books.* Manuel Velasquez, *Business Ethics: Concepts and Cases* (Prentice-Hall 1982), defines (job) discrimination as follows: "Making an adverse decision (or set of decisions) against employees (or prospective employees) who belong to a certain class because of a morally unjustified prejudice".

discrimination against Whites is not the intention of any of the admission officers concerned; we like to recommend fair compensation in cash or kind for the White accidental victims of the policy. As Professor Dworkin himself admits, "It is hardly Bakke's fault that racial justice is now a special need". Among other reasons, this will make the burdens of these unintended victims of the SAA program a bit lighter in the interest of fairness and in line with the Equal Protection Clause in the 14th Constitutional Amendment.

To achieve this objective, we suggest that university and college authorities, including admission boards working in collaboration with their respective states, and the Office of the Secretary of Education should create some handsome "packages" for them as compensation. The contents of the packages could include admission to comparative educational institutions with full or partial scholarships or cash. This compensation will be analogous to and as justifiable as the compensations paid to the unintended victims of federal or state construction or expansion of highways, freeways, airfields, and dams etc. These include payments to private owners of homes and commercial or industrial buildings that have to be removed or demolished to make way for federal or state construction projects under the "eminent domain" constitutional provision.[39] By parity of reasoning, the admission spaces of the White victims of SAA have been taken over by the authorities concerned with the backing of state and federal governments under a similar "eminent domain" provision in the SAA as defined by President Johnson, and is therefore equally justifiable.

CONCLUSION

Professor Dworkin passed away early this year in February. But thankfully, his legacy for the Civil Rights and the Civil Rights Movement has not and will not pass away. In spite of the ongoing challenges to Affirmative Action and the Trevor Martin case in Florida and the disappointing Supreme Court ruling on Black voting rights in some Southern States, it will continue to live on through the thousands of law students he has taught at Yale, Harvard, Princeton, New York University and Oxford, just to name a few. It will live on through his colleagues in the American Philosophical Association such as the eminent African American Professor of Philosophy, Bernard Boxill, who uses Dworkin's name 99 times in his *Blacks and Social Justice* and describes one of his essays in

[39] The 5th Amendment to the U.S. Constitution requires the government to provide just compensation to the owner of any property taken over by federal, state or city governments for public use. *Available at* http://legal-dictionary.thefreedictionary.com/eminent+domain.

support of desegregation as "characteristically novel and provocative".[40] It will also live on through the American Law Association, and in the present and future Supreme Court Justices he has helped to educate through his columns in the *New York Times*, and in his landmark publication, *Taking Rights Seriously*. It will also live on through the new group of African American Civil Rights Attorneys[41] undoubtedly influenced by Dworkin's ideas on Civil Rights. The legacy will also continue to live through all of us as Civil Rights Conference participants, Civil Rights scholars or advocates fighting for social justice if we resolve from now on that like Professor Dworkin, we will take or continue to take all rights seriously including the Civil Rights, of all the abandoned.

[40] Boxill, B.R., Blacks and Social Justice Social Justice, Totowa, N.J. Rowman and Allanheld, 1984.
[41] Goluboff, Risa, Review Article, *Representing the Race*; The Creation of the New Civil Rights' Lawyer by Kenneth W. Mack (Harvard University Press, Cambridge, Mass 2012), at 330. This book reviewer describes the emergence of the Black Civil Rights lawyers as a paradigm shift in the last several years, Harvard Law Review, Volume 126, June 2013, No. 8.

THE POLICE INVESTIGATOR'S AUTHORITY TO ISSUE PROVISION LETTER OF INVESTIGATION CANCELLATION: ITS URGENCY IN THE PERSPECTIVE OF INDONESIAN CODE OF CRIMINAL PROCEDURE

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I Nyoman Nurjaya[***] *& Koesno Adi*[****]

According to integrated criminal justice system, Police is the gatekeeper of the Indonesian criminal justice system or the pioneer State's institution and agency in criminal law enforcement. Consequently, when public are disappointed with law enforcement, attention will firstly be directed to the police. Hence, according to the Direction of the Chief State's Police No. KEP/37/X/2008 concerning the Accelerated Program of the Indonesian Police Transformation towards independent, professional and accountable police, all levels of police structure are ordered to be able to change the paradigm of the police services as soon as possible. In addition to that, police investigators have published some letters of Investigation Cancellation Order (SP3) as it is a part of police' authority stipulated in the Code of Criminal Procedure (KUHAP) and the Law No. 2 Year 2002. However, there are still abundant of cases to solve. Consequently, there should be policy regulating the authority of investigators to issue Provision Letter of Investigation Cancellation (SKP2).

This modest article attempts to describe philosophical foundation of the urgency of police authority to issue SKP2 and the juridical implication covers the law enforcement effort, strenghthening the realization of duties and responsibility of the police investigators in settling cases and facilitating the effort to attain the goals of the law namely justice, usefulness, and legal certainty, as well as assisting to search and find the substantially truth by paying attention to the protection of human rights.

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INTRODUCTION

Indonesian police as the forefront element in criminal law enforcement has recently been a focus of public attention. This is caused by some cases which shape the image of the police as if they are the largest part of the mafia syndicate dealing in the business of law. To illustrate this, the notorious Gayus Tambunan and Nazarudin cases are proved to involve many police officers from the level of rank and file up to the commissioned officer.[1] The worry expressed by the public concerning the work of the police cannot be regarded as merely disappointment, but it should also be regarded as the public hope for the change of the police paradigm.

Actually, according to Indonesian criminal justice system, police is the gatekeeper in addition to other criminal law enforcement institution. Consequently, when there is a disappointment against law enforcement process, public attention will firstly be directed to the police.[2] Public complain against the police performance is reflected in the report of the National Police Commission (KOMPOLNAS). It describes that suggestion and public complain directed towards the Police Detective Office occupy the highest number. More than 90% of public suggestion and complain on police work are directed towards the Police Detective Office.[3]

It is recorded that in the period of January to September 2010, there are 1,106 out of total 1,199 public suggestions and complains directed to the Detective Office. The high figure indicates the abundance of violation committed by the police officers covering arrest, confinement, confiscation,

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[1] Gayus Tinggalkan Rutan Brimob, KapolriJanji TindakTegas (Gayus left Probation House, The Chief National Police Promises the Real Act), www.mediaindonesia.com 09/11/2010. (last visited Jan. 12, 2011).

[2] Edi Setiadi, Reformasi Kepolisian (Police Reformation), www.unisba.ac.id. (last visited Nov. 12, 2010).

[3] Keluhan terhadap Satuan Reserse Kriminal Polri masih Tertinggi (Highest Rate of Police Criminal Unit Claim), www.Mediaindonesia.com. (last visited Dec. 12, 2010).

shakedown, house breaking and letters checking according to the Code of Criminal Procedure.[4] In line to the data reported by the National Police Commission (KOMPOLNAS), complains against the Indonesian National Police continuously rise every year and those directed towards the Police Detective Office are still predominant. In 2008, there are 895 out of 1,035 complains are directed towards the Police Detective Office. Also, in 2009, there are 1,386 complains out of 1,466 suggestions and complains in total directed to the office.[5]

The data and fact mentioned above lead us to conclude that police institution does not fulfill its professional standards or have operational problems in their law enforcement duties, especially in the enforcement of the Criminal Code or more specifically concerning with enquiry and investigation duties. On the other hand, police has worked hard to change the image. One of the efforts is the application of ISO-2008 in the field of investigation and consequently all investigation process must follow the designed standard operating procedure (SOP) of which result is open to be accessed by the public.[6] Unfortunately, regardless inquiry and investigation which are carried out in accordance with the SOP, there are still many cases to solve in each investigation unit.

Moreover, in line with the authority of police investigator, reports expressed by the public are responded by the police referring to the Code of Criminal Procedure (KUHAP) and the Law No. 2 Year 2002 concerning National Indonesian Police. When an investigation indicates that there are not enough proofs, or the case turns out to be non criminal act, a Letter of the Cancellation Order for Investigation (SP3) is issued to cancel the investigation. Such a letter has often been issued by the investigator, but there are still abundant of cases in each investigation unit. This phenomenon is recorded in the finishing report of cases in the Special Crime Unit of the Greater Area of Surabaya District Police.[7]

The issuance of the Letter of Cancellation Order of Investigation implies that the investigation on the reported cases has finished. On the other hand, in the implementation of investigation process, there are often cases which are quite complicated and not simple. To gather evidence and proofs, or to learn whether a case can be categorized as crime or not is not

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[4] Topo Santoso, *Evaluasi Penanganan Saran dan Keluhan Masyarakat Serta Evaluasi KUHAP terkait Upaya Paksa* (People claim handed Evaluation and Criminal Procedure Law Evaluation), Sekolah Tinggi Ilmu Kepolisian, Jakarta, 2010.

[5] *Ibid.*

[6] *Document of Police Standard Operating Procedure*, Kepolisian Resort Kota Besar Surabaya.

[7] Rekapitulasi Laporan Polisi Tahun 2005 sampai dengan April 2011(Recapitulation of Police Report of 2005 to April 2011), Unit Pidana Tertentu Kepolisian Resort Kota Besar Surabaya.

an easy process. Therefore, the Letter of the Cancellation Order of Investigation is issued to avoid protracted problem although there is a possibility that there can be evidence and proofs which can prove the nature of the criminal case. Hence, it must be processed in order to achieve and find material truth of the case or in order to achieve the goal of the Code of Criminal Procedure.

The rule on the investigation and its cancellation is found in the Article 109 of the Code of Criminal Procedure (KUHAP). It stipulates that the cancellation of investigation obliges the investigators to inform the public prosecutor, the suspect and the family. However, the form of the information is not clearly regulated in the form of the Information Letter on the Cancellation of Investigation nor as commonly practiced in the form of Letter of Cancellation Order of Investigation, nor letter in any other form. Therefore, police investigators cannot do anything although the investigation has been underway for quite a long time due to the complicated nature of the case or lack of evidence or proofs. This finally results to greater pile of cases waiting to be solved.

On the other hand, the prosecution stage as stipulated in the Article 140 of the Code of Criminal Procedure asserts the authority of the public prosecutor to cancel the prosecution due to the lack of evidence or the case turns out to be non criminal act and/or it is consequently closed in the name of law. The difference is that the form of the prosecution cancellation is clearly stated as the provision letter. The Provision Letter of the Prosecution Cancellation is not a case dismissal (*deponeering* in Dutch). The difference is that the prosecution cancellation stands for the temporary stop of the prosecution. The prosecution still has the possibility to resume in the court if there is a new reasonable finding someday. On the other hand, case dismissal stands for ultimate closing of a case and there will never be another prosecution nor reopening of the case.[8]

Due to the stipulation mentioned above and facts surrounding law enforcement process at the inquiry and investigation level, it is therefore the Chief of the Indonesian National Police issues Direction No. POL: KEP/37/X/2008 concerning the Acceleration Program of Police Transformation to Independent, Professional, and Accountable, in order to change the police paradigm as to formulate a policy regulating the authority of police investigator to issue the Provision Letter of Investigation Cancellation (SKP2) on cases that meet requirements. The Provision Letter of Investigation Cancellationis actually aimed at facilitating the search for

[8] Martiman Prodjohamidjojo, *Komentar atas Kitab UU Hukum Acara Pidana (A Critical Comments of Indonesian Code of Penal Procedure)* (Pradnya Paramita, Jakarta 1982), at 81-82.

substantially truth as well as being directed towards the reduction of cases piling up in each investigation unit.

I. PHILOSOPHICAL FOUNDATION OF URGENCY THE AUTHORITY POLICE INVESTIGATORS TO ISSUE PROVISION LETTER OF INVESTIGATION CANCELLATION

Inquiry and Investigation were formerly known as scrutiny (*opsporing* in Dutch). The term scrutiny was later changed into investigation after the promulgation of the Law No. 13 Year 1961 on the Principal Regulation of National Police which was replaced by the Law No. 28 Year 1997. The latter is finally replaced by the Law No. 2 Year 2002 on the Indonesian National Police in which investigation is also regulated. The definition of scrutiny according to De Pinto refers to the preliminary investigation carried out by the officers given the authority by the law soon after they hear about the incidence of violation against the law.[9] Therefore, investigation is an English term which is synonimous to *opsporing* in Dutch, *penyiasatan* in Malay, and *penyidikan* in Indonesia. It is a juridical activity carried out by the police investigator to search and find the real truth (clarifying the crime occured).[10] In simple words, investigation is a juridical activity. It means that activities carried out in accordance with positive law will lead to results that must be juridically accountable as well. The reason of it is that the word "juridical" refers to regulation which becomes the basic of an act. To be exact, the regulation refers to Code of Criminal Procedure (KUHAP).

The KUHAP does not formulate the Letter of Investigation Order (*Surat Perintah Penyidikan*) [11] or the Provision Letter of Investigation. On the other hand, it regulates the investigation cancellation as stipulated by the Article 109 of the KUHAP. By combining the definition of investigation and the stipulation on the investigation cancellation in the Article 109 paragraph (2) above, it can be formulated that the investigation cancellation is an act of the police investigator to cancel the investigation of an act suspected as a crime because there is not adequate proof to clarify the case and judge the suspect as the perpetrator. It can also be due to the investigation result showing that the act is not crime, or the investigation is stopped in the name of the law.[12]

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[9] Andi Hamzah, *Hukum Acara Pidana Indonesia (Penal Procedure Law of Indonesia)* (Sinar Grafika, Jakarta 2006), at 118.
[10] *Ibid.*
[11] Hussein Harun, *Penyidikan dan Penuntutan Dalam Proses Pidana (Investigation and Prosecution in Indonesian Criminal Procedure Law)* (Rineka Cipta, Jakarta 1991), at 76-79.
[12] *Ibid* at 310-311.

The law has stipulated limitatively the reason that can be the legal basis for the police investigator to cancel investigation. It is important to stipulate the rule for the reason in order to avoid negative tendency of the police investigators. By making the stipulation, it is hoped that police investigators exercise their investigating authority by regarding the reasons stipulated by the rule. Therefore, the investigation cannot be exercised freely without legal reasons. In that way, parties who disagree with an investigation cancellation can easily learn the legal reason behind it. The stipulated legal reason can also be used in pretrial process for examining whether or not an investigation cancellation is legal.[13]

An investigation cancellation as stipulated in the Law implies permanent policy in the form of Letter of Order for Investigation Cancellation (SP3). On the other hand, the complicated nature of public report on the occured case make the investigation difficult to carry out. Therefore, it takes time to gather evidence in order to decide whether an act is a crime or not. Sometimes, police investigators encounter a complicated and mixed-up case and therefore it takes a long time to gather evidence in order to decide whether an act is a crime or not. On the other side, investigation is aimed at elucidating a crime and arresting the perpetrator. Besides, the legal reasons underlying the cancellation of investigation are limitatively stipulated in the Law. Again, it is a must to find adequare evidence and clarification before determining whether an act is a crime or not.

However, investigation on a simple case which is easy to handle and it is clearly a crime or definitely not a crime can immediately be cancelled when there is no adequate evidence as stipulated in the Article 109 KUHAP. To fulfil the requirement if the investigation is cancelled, a Letter Order for the Investigation Cancellation (SP3) is issued. Yet, an investigation on a complex case, regardless its crime nature, can also be temporarirly cancelled. The reason of it is that the investigation can be recommenced when a new evidence is found. Hence, a policy formulation giving basis for police investigators to temporarily cancel the investigation is needed. To be specific, it is necessary to formulate a policy to issue the Provision Letter of Investigation Cancellation (SKP2).

The issuance of the Provision Letter of Investigation Cancellation is juridically, theoritically, and sociologically urgencies namely: (a) Juridically, the police investigators have a legal authority to cancel investigation

[13] Harahap Yahya, *Pembahasan Permasalahan dan Penerapan KUHAP: Penyidikan dan Penuntutan (Implementation of Penal Procedure Law: Investigation and Prosecution)* (Sinar Grafika, Jakarta 2005), at 150-151.

including issuing the Provision Letter of Investigation Cancellation. This is based on the Article 13, Article 14, Article 15, Article 16 of the Law No. 2 Year 2002 on Indonesian National Police, and Article 6, Article 7, Article 107, Article 108, Article 109 of the Code of Criminal Procedure (KUHAP); (b) Theoritically, the issuance of SKP 2 is fully based on theoretical conceptions. They are theories on restorative justice and out-of-court dispute settlement. The restorative justice process is essentially exercised through discretion and diversion (the diversion effort of the crime trial to settlement through consultative negotiation); and (c) Sociologically, the orientation of this aspect is Indonesian community of which cultural root comes from the cultural value on family and prioritizing the principle of consultative negotiation (*musyawarah* in Indonesia) to solve a dispute in a social system. In order to make things clear, those aspect and dimension are settled through local wisdom of the customary law (*adat* law/*hukum adat*). Besides, history has shown that the first law comes into effect and the one that reflects the legal awareness of the public is the local wisdom of the *hukum adat*.

Referring to the urgencies mentioned above, juridical and theoretical as well as sociological considerations are naturally basics in the formulation of the authority of police investigator in issuing Provision Letter of Investigation Cancellation. This analysis leads us to conclude that the formulation policy on the authority of police investigators to conduct investigation including issuing the letter of investigation cancellation as stipulated in the Article 109 of the KUHAP has not accommodated urgencies and consideration mentioned above.

II. JURIDICAL IMPLICATION OF THE PROVISION LETTER OF INVESTIGATION CANCELLATIONISSUANCE BY THE POLICE INVESTIGATOR

The Decree of the People's Consultative Assembly No. VII/MPR/2000, which is strenghthened by the Law No. 2 Year 2002 on Indonesian National Police obliges the establishment of the national police institute. Both legislation product can be deemed as a progressive step in accommodating domestic public demand. The demand is about the importance of an institution which is hoped to be able to improve the independence, professionalism, and accountability of Indonesian National Police.[14]

Regardless the position of Indonesian National Police as the National Law Enforcement Institution, they are under the umbrella of the law in order

[14] Farouk Muhammad, *Komisi Kepolisian Nasional: Format Masa Kini dan Gagasan Rancangan Masa Depan (National Police Commission: Recently Structure and Idea for the Future Design)* (Sinar Grafika, Jakarta 2000), at 15.

to guarantee that their acts are in accordance with the allowed corridor. Only by making sure that every move of the police is always supported by the law, all levels of police can hope that they can get legitimacy and support from the public in general. Yet, the problem lies here. Although there are many rules imposed on the police officers, in reality, not all norms or rules of engagement can be put into action. The legal instrument which is conceptually ideal still has to face many problems if applied to confine the behavior of the police. The law is not quite detailed and therefore it cannot be applied to all occured cases. A further consequece of it is that there are rooms for discretionary practice. The wider the gap between practice and theory, the bigger is the justification for the police to exercise their discretionary authority.

The authority to issue Provision Letter of Investigation Cancellation exercised by the police investigator causes implication on the realization of justice, legal certainty and usefulness as the goals of the law. It also results in the implication on the strengthening of existing police authority in general.

A. Implication on the Realization of Justice

The second principle and the fifth principle of the State's Ideology of *PANCASILA* contain the word "justice" meaning that justice must be enforced and upheld highly. The enforcement of justice in the community has important significance in the effort to develop the nation's civilization in order to reach its highest level and ultimate dignity. The civilization of a nation will not be advanced if it is not based on justice. This is why law functions as the protector of human being, creator of the order and balance in order to achieve desired justice.

Justice is the final destination of a legal system which is closely related to the function of legal system as a facilitator in distributing and maintaining values in the community. Such values are planted with the perspective of truth which generally refers to justice. Sometimes, positive law does not fully guarantee justice. On the other hand, justice often creates legal uncertainty and therefore, as a compromise, positive law must reflect the value of justice.[15]

In order to maintain a good effort of justice enforcement, it is important to establish institutions specializing in implementation and monitoring of justice enforcement programs. In that way, those institutions are not only directed towards the justice enforcement only, but also monitoring the

[15] Dyah Octorina dan IGN Parikesit, *op.cit.*, at 8.

justice enforcement program.[16] To realize justice, it is necessary to conduct a trial on the violation of law which is commonly known as law enforcement activity. Law enforcement in narrow perspective covers reaction against all violations or deviance against the law, especially through crime trial process involving the role of police, public attotney, lawyer and other court institution. Therefore, in narrow sense, actors with outstanding roles in law enforcement process are police, public prosecutors, defense attorneys and judges.[17]

B. Implication on Strengthening the Existence of Police Authority

The management practiced by Indonesian National Police is known as the new management of police organization. It signifies that Indonesian police exists in an era where police performance as a public institution must be supported by principles and commonly practiced by private institution. These principles cover efficiency, effectivity, accountability, and result-oriented. Public institution, according to this perspective, cannot evade the application of those principles because, essentially, there is no difference between public institution and private one as an entity who develop resource and improve the usefulness of the resource.

Consequently, this perspective leaves the way of thinking which solely regard the conception of the ideal police and policing. In general, there are four standards for measuring the ideal accomplishment concerning organization and police activities. Those standards are: (a) Ratio between the police and the citizens; (b) The use of police technology; (c) Financial support; and (d) Respect for local culture or local wisdom.

A police organization, either at national level or regional level, which is existing in the mainstream of modern police organization and only needs to develop one or more aspects had better search for a benchmark from more advanced police organization. In other words, the benchmarking process should be done by another police organization of the same cluster.

C. Implication on Realization of Legal Certainty

As previously explained, investigation requires the collection of evidence in order to clarify a crime act. The evidence referred is the valid one, or to be exact, the one related to the crime act. The evidence can be used to prove the crime case and to establish the judge's confidence on the

[16] Rena Yulia, *op. cit.*, at 135.
[17] Jimly Asshidiqqie, *op. cit.*, at 312.

truth about a crime case and the guilt committed by the defendant.

The Article 183 of Code of Criminal Procedure regulates whether or not the evidence is enough. This article stipulates that a judge cannot impose a verdict upon someone unless supported by two kinds of valid evidence and he or she is sure that a crime has happened and the defendant is the perpetrator. Therefore, evidence is adequate if it consists of, at least, two kinds of valid evidence added by the confidence of the judge. Concerning with valid evidence, the Article 184 of the KUHAP elaborates that it consists of testimonial of the witness, expert's opinion, letter, clues and defendant's statement. In the practice of crime trial, the minimum requirement of the evidence is known as minimal evidence.

According to Hussein[18], a method to decide whether an act is a crime or not is actually a part of material criminal law. A practical way that can be exercised is based on the definition of the crime itself. An incidence or an act can be qualified as a crime if the Criminal Code regulates such an act as a crime and therefore, stipulates its sanction. Hence, a crime act is an act regulated and threatened with a sanction by the criminal law. The basis of the theory is the Article 1 of the KUHAP stipulating that there is no punishable act except for the ones stipulated by the law previously promulgated. Consequently, an act which is not previously stipulated as a crime by the Criminal Code is not a crime.

The reason of investigation cancellation, as stipulated in the Code of Criminal Procedure, shall be a measurable one. Hence, reasons which cannot be measured, not clear, or solely based on the authority of police investigator cannot be accepted.

This is where the justice value of investigation cancellation lies. The investigation cannot be stopped because of the interest of one party. It can only be cancelled in accordance with the stipulation which prioritizes the interest of the public. Especially all parties directly involved. The interest of the victim is that the perpetrators can be punished according to their guilts. The interest of the defendant is that he or she can be protected fairly and there is adequate evidence to process it in the investigation and its subsequence. If there is no enough evidence, the suspect should be assured that the investigation is cancelled. In this way, the defendant does not become the hostage of the investigation which can create material and psychological burden.

If the involving parties think that the cancellation of investigation is not right or not in accordance with measured reason as stipulated by the Laws,

[18] Husein, *op. cit.*, at 239.

especially Code of Criminal Procedure, they can convey their objection through pretrial institution. The Article 77 of the Code of Criminal Procedure stipulates that the state court has the authority to examine and decide in accordance with the law concerning with (a) lawfulness or unlawfulness of the arrest, confinement, investigation cancellation or prosecution cancellation, and (b) compensation and/or rehabilitation for someone whose criminal case is cancelled at the level of investigation or prosecution.

It is further stipulated that the exercise of the court's authority mentioned above is pretrial led by a single judge assigned by the chief of the state court assisted by a court clerk. The proposition on lawfulness or unlawfulness of the arrest or confinement is made by the suspect, suspect's family or guardian and conferred it to the chief of the state court by mentioning the reason. The examination on lawfulness and unlawfulness of an investigation cancellation or prosecution cancellation can be proposed by the investigator or public prosecutor or the third party implicated in the case to the chief of the state court by mentioning the reason.

It is therefore, the authority of police investigator as stipulated in the Code of Criminal Procedure is categorized in both broad term and unexplained meaning. Such a reality requires the discovery of actual meaning. In other words, it is necessary to search for the legislative purpose and public purpose. If the purpose of pretrial on investigation cancellation or prosecution cancellation is aimed at correcting or supervising the possibility of mistake as well as the arbitrariness, the third parties implicated, such as public in general represented by an NGO, have the right to propose for the process.

CONCLUSION

The explanation and analysis written above lead the researcher to conclude that the philosophical ground for the importance of formulation policy on the authority of the police investigator to issue Provision Letter for Investigation Cancellation refers to the authority stipulated by the Laws is not adequate for realizing the ideal of the law covering justice, usefulness and legal certainty. In addition to that, the philosophical ground does not adequately lead to the attainment of the goals of Code of Criminal Procedure in searching and finding the material truth. It can not help to reduce the pile of cases needed to solve. Hence, it is necessary to create formulative policy which clearly gives a power to the police investigator to issue Provision Leter for Investigation Cancellation (SKP2).

The formulation policy on the authority of police investigator to issue Provision Letter of Investigation Cancellation is exercised through the ammendment or revision and addition on the authority of police investigator to cancel the investigation as stipulated by the Article 109 of the KUHAP. In this way the authority of the police investigators to issue Provision Letter of Investigation Cancellation is written limitatively. This is aimed at revisioning the Indonesian Code of Criminal Procedure in order to make it more responsive when there are cases needed to solve by police investigators professionally and proportionally realized through the revision of the Article 109 paragraph (2). When the investigator cancel the investigation due to the lack of evidence or the case turns out to be non-criminal case or the investigation is cancelled in the name of Law, the investigator can write about that in a letter of order or provision letter. Content of the letter is informed to the public prosecutor and the suspect. If the suspect is arrested, he or she must be released immediately. Copy of the letter must be forwarded to the suspect or his/her family or his/her defense attorney. Concerning the provision letter, if a new reason comes up, the provision of investigation cancellation is revoked and the investigator can resume the investigation.

The juridical implication of the issuance of the Provision Letter for Investigation Cancellation to law enforcement effort is that it can empower the implementation of police investigator's duty and responsibility in handling cases. Also, it can facilitate the attainment of law's goal in creating justice, improving usefulnes and establishing legal certainty. Last but not least, it is hoped to be able to ease the effort to find substantially truth by assuring the protection of human rights.

As an alternative for improving or revising the Article 109 paragraph (2) of the KUHAP, it is recommended that an ammendment should be written as follows:

(1) When the investigator has started an investigation on a crime, the investigator informs it to public prosecutor.

(2) a. When an investigator cancels the investigation due to the lack of evidence or it is found out that the case turns out to be non crime or the investigation is cancelled in the name of law, the investigator can write that in a letter of order or provision letter;

b. The content of the letter is informed to the public prosecutor and the suspect. If the suspect is arrested, he or she must be released immediately.

c. The copy of the letter must be forwarded to the suspect or his/ her family or his/ her defense attorney.

d. Concerning the provision letter, if a new reason comes up, the provision of investigation cancellation is revoked and the investigator can resume the investigation.

(3) When the cancellation mentioned in the point (2) is done by the investigator as stipulated in the Article 6 point (1) letter b, the information on the matter is immedaitely forwarded to the investigator and public prosecutor.

Through the formulation policy of the authority of police investigator to issue Provision Letter of Investigation Cancellation, as the revision of the Article 109 of KUHAP, urgencies and considerations in achieving the goal of Code of Criminal Procedure can be accommodated. Consequently, substantially truth will also be realized and the pile of cases can be reduced.

DIFFICULTIES IN ESTABLISHING LIABILITY IN ONLINE DEFAMATION: TANZANIA'S EXPERIENCE

Charles W. Marwa[*] *& Asubuhi Stephen*[**]

This paper is devoted to uncover difficulties in establishing liability in online defamation in Tanzania. The focus is on the effectiveness of the current laws and regulations relating to the online defamation; and the lack of awareness to the general public on legal and practical challenges in establishing liability over the defamatory comments occurring on the Internet. The investigators discover that, the existing legal framework in Tanzania does not cover the issues of establishing liability in online defamation. Moreover the legal and practical challenges includes the weakness of the law and regulations covering online defamations, limitation periods, jurisdiction and choice of law issues, admissibility of electronic evidence and its authenticity, identifying anonymous defendant and the rights to privacy. Authors recommend that responsible machinery be established by Act(s) of parliament that would address by dealing with specific issues of liability in online defamation to Internet users, Internet Service providers (ISPs) and intermediary for their defamatory comments.

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INTRODUCTION

The law of defamation develops historically as a means of protecting reputations. It does so by providing a party with the means of redress in the event that their reputation is unfairly damaged by a third party. These legal protections have become increasingly important in today's digital age. The Internet is now more accessible than ever before, and its interactive nature makes it easy for anyone to write messages or post content online. While this increased ability to share information has provided society with many benefits, it has also introduced increased risks.[1] It is a medium which does not respect geographical boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored, and heralding a new and global age of free speech and democracy, the Internet is potentially a medium of virtually limitless international defamation.[2] Like other countries in the world, Tanzania also has adopted the use of Internet led by Information Communication Technology individuals who are accessible to computer use and the users face the problem of identifying a defendant online when defamed. However, there is no specific law which takes into account the development of technology which is always moving quickly.

I. CONCEPT OF DEFAMATION AND ONLINE DEFAMATION

Defamation[3] is defined as "an intentional false communication either published or publicly spoken, that injures another's reputation or good name". Defamation includes the common law torts of libel (involving written or printed statements) and slander (involving oral statements). Significantly both libel and slander could be committed via Internet medium.[4]

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[1] Rakochey R. & Dixon, M, "The Law of Internet Defamation in Canada" Paper presented on March 3-4, 2011 at Calgary, Alberta.
[2] Collins M, THE LAW OF DEFAMATION AND THE INTERNET 24.02 (Oxford University Press, 2001).
[3] Garner B, BLACK'S LAW DICTIONARY 449 (6th ed., 1990).
[4] Skolnick, for example, maintains that: "The protection defamation law affords is to the individual's projection of self in a society". Jerome H Skolnick, *The Sociological Tort of Defamation*, 74 CALIFORNIA LAW REVIEW, 677 (1986).

The Internet defamation occurs when a person sends another person an email message containing defamatory remarks about another (natural or juristic) person (or its products). Posting a defamatory message on a web bulletin board will make a defamatory statement in a discussion forum of a website or social network, uttering defamatory words during a video conference taking place via the Internet.[5] There are many people in the world who get joy out of hacking into other's accounts. From there, these people often post information and photos that are not meant to reach the public. This is one of the many types of online defamation that is growing by leaps and bounds.

In the case *Hamisi v. Akilimali*[6], defamation was defined by the court as communication to the mind of another, matters which are untrue and likely in the natural cause of things substantively to disparage the reputation of a third person. Form the definition, it could be argued that defamation as such requires the following ingredients to be proved; there should be publication of a statement, the word must be defamatory and those defamatory statements must refer to the plaintiff.

Defamation is an intrinsically personal wrong. The gist of defamation is actual or presumed damage to the reputation flowing from publication. In other words, defamation flowing from publication (or communication) of information,[7] in traditional libel cases publication is referred[8] to as "the date on which the libelous work was placed on sale or became generally available to the public". It has the following ingredients:

a. Publication of a statement;

b. Statement makes reference to the plaintiff;

c. Statement is communicated to some person or persons other than the plaintiff;

d. Statement reaches the plaintiff; and

e. Statement causes actual or presumed damage to the plaintiff.

The question is does one encounter similar "ingredients" when defamation occurs in Internet medium. The only difference is that the tort of defamation occurs when the defamatory imputation is published in electronic form, everything else remain the same.[9]

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[5] http://www.onesbahamas.com?=135 &a=7609 (last visited April 10, 2013).
[6] (1971) HCD 111.
[7] SHARMA, V., INFORMATION TECHNOLOGY LAW AND PRACTICE 306 (2nd ed., Universal Law Publishing Co. Pvt Ltd, New Delhi, 2010).
[8] Kenneth Love v. William Morrow & Co., 193 A.D. 2d 586.
[9] Sharma, V. (2010), *op. cit.*, at 306.

II. PUBLICATION OF DEFAMATORY STATEMENTS ON THE INTERNET

Publication is defined as the action of making publicly known. In the context of Internet, the term publication includes dissemination, transmission and storage of information in retrievable magnetic or optical storage like floppy disc, CDs, DVDs and etc.

In order to know the relationship between defamation and publication in the Internet medium, it is good to understand: when a publication takes place, how a publication takes place, where a publication takes place and who is responsible for the publication of the defamatory statements.

A. When a Publication Takes Place (Which Involves Time of Occurrence)

Publication occurs when oral or written words are seen or heard and comprehended by the reader or hearer.[10] From this point of view, the process of publication is complete when the communication reaches him. In the common law case of *Godfrey v. Demon Internet ltd.*[11], Morland, J. ruled that:

> …publication occurs where the defendant transmits and whenever there is transmitted from storage of its new server a defamatory posting, publishing that post to any subscriber to its ISP who accesses the newsgroup containing that posting. Thus every time one of the defendant's customers accesses 'news group' and sees that posting defame the plaintiff, there is publication to that customer.

B. How a Publication Takes Place (Which Involves the Mode of Publication)

The issue is in what form (mode) that publication has happened is an important issue in the techno-legal driven environment, it looks into the mode of publication; it can be audio, video, textual or multimedia.[12] Instances of defamation in electronic form include generating, sending or receiving defamatory emails, online bulletin board messages, chat room messages, music downloads, audio files, one-to-one email message, mailing lists, newsgroup and World Wide Web, all these may be referred as sites of defamation on the Internet and also explained hereunder.

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[10] Mark, P., Carolyn, P. & Peter, W. (2003), "The cyber boundaries of reputation: implications of the Australian High Court's Gutnick decision for journalists", http://epublications.bond.edu.au/hss_pubs/79 (last visited March 26, 2013).
[11] 4 All ER 342 High Court.
[12] Sharma, V. (2010), *op. cit.*, at 306.

C. One to One Email Messages

Anyone who has used email will know that it is remarkably quick and easy to use. Comments can be typed in haste and sent at the press of a button. Compared with conventional written correspondence, where there is typically time to draft the statement, print or type it out, re-read, re-draft, and then think before signing, putting the message in an envelope, attaching a stamp and putting in the post, transmission of email is virtually instantaneous and usually, once sent, is irrevocable. As a result, email correspondence is often in substance more like spoken conversation than written interaction for habitual users hasty, ungrammatical and rash and tends to lead parties to say things they would not normally commit to writing, let alone widely published writing, but would infact say in face to face interaction with the other party.

Psychologically, electronic interaction combines a sort of deceptive distance, one is after all sitting safe behind a terminal in one's own office when writing with a kind of equally deceptive intimacy. Studies and anecdotal evidence show that there is a lack of body language, eye contact or spoken cues, as there would be in conversation or on the phone, to prevent the making of inappropriate statements. All this means that those sending email are dangerously prone to making remarks that turn out to be legally actionable.[13]

In Tanzania case of *Lazaraus Mirisho Mafie and M/S Shidolya Tours & Safaris v. Odilo Gasper Kilenga Alias Moiso Gasper*[14] is the best example of the defamation cases occurred through email in which the Plaintiff in this case claimed against the Defendant for certain sums of money as special and general damages resulting from the alleged defamatory email statement which the plaintiff claim was sent, made and published by the defendant against him.

D. Mailing Lists

The format of an electronic mailing list is that various parties subscribe by email to the list, which is administered by some central host.[15] The

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[13] Lilian Edwards, *Law and the Internet—Regulating Cyberspace*, Defamation and the Internet: Name Calling in Cyberspace (Hart Publishing, London 1997). *See also* www.law.ed.ac.uk (last visited April 10, 2013).

[14] Commercial Case No. 10 of 2008, The High Court of Tanzania at Arusha (unreported).

[15] Lilian Edwards, *Law and the Internet—Regulating Cyberspace*, Defamation and the Internet: Name Calling in Cyberspace (Hart Publishing, London 1997). *See also* www.law.ed.ac.uk (last visited 10/04/2013).

subject of discussion of the list may be anything from Internet law to real ale to homosexual fantasies. Usually, the list is set up so that, by default, any email message sent by any subscriber to the list is "bounced" or "exploded out" to every other subscriber and many of whom will, as the parlance goes, "lurk" and never be known to exist to the person commenting. Mailing lists combine all the general problems of email discussed above, with some extra difficulties of their own. It is very easy for the slightly careless or inexperienced user of such a list to think they are replying only to the maker of a particular comment but actually send their reply to every member of the list.

The embarrassment factor can be considerable, particularly when the members of the list form a small professional community within which the professional reputation of the person defamed can be severely damaged.[16] It is not a coincidence that one of the very few cases across the globe on Internet libel did not settle out of court, *Rindos v. Hardwick*[17] revolved around comments made on a mailing list for academic anthropologists in which comments were made implying that Rindos, the Australian plaintiff, had been denied tenure because he was not a properly ethical researcher and was academically incompetent.

E. Newsgroups, the USENET and Discussion Forum

Newsgroups are discussion forum which are made up of comments from their subscribers, sorted by subject matter. All it takes to subscribe and post comments to a newsgroup is rudimentary software, obtainable for free as shareware, and an Internet connection. Collectively, the newsgroups available to Internet users are sometimes known as the "Usenet". There is something like 14,000 Usenet newsgroups subscribed to the masse by millions of subscribers, located in every country where Internet is access. As a result, any comment posted to a Usenet newsgroup is virtually guaranteed to be published, and read, within days if not hours, in many hundreds of national jurisdictions. As it can be imagined, the volume of material published in these forums is enormous one estimate is that around 4 million articles are available at any particular time.[18]

Newsgroups are even more problematic from the defamation point of view than the rest of the Internet because of what may be described as

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[16] *Ibid*.
[17] Australian Supreme Court No. 993 of 1994.
[18] Lilian Edwards (1997), *Law and the Internet—Regulating Cyberspace*, Defamation and the Internet: Name Calling in Cyberspace (Hart Publishing), *see also* www.law.ed.ac.uk (last visited April 10, 2013).

traditional "Internet culture". Until very recently roughly, in the early 90s the Internet was largely the domain of technophiles, students, academics and workers in the computer industry, principally in the US. These users largely accessed the Internet for free and used it for non-commercial purposes. There was a strong collective sentiment towards anarchy, libertarianism and free speech rights and a strong corresponding dislike of corporate, governmental or legal authority or control.

In this culture, full, frank and unfettered discussion was known as "flaming", which was often indistinguishable from rudeness and abuse, was not only tolerated but by and large encouraged. The usual remedy for being flamed was not to post a writ for libel, but extra-legal self-help in other words, flame back. It was not uncommon for newsgroups to degenerate into "flame wars" torrents of abusive comments which destroy all sensible discussion in the group. This was all very well, perhaps, when most Internet users shared a similar cultural background. But in recent years, the Internet has ceased to be the domain of "netizens" and become extensively used by individuals and families, including children, who pay for Internet access and expect it to respect the same standards of decency and courtesy as other media.

Even more important, corporate use has expanded enormously, as firms who see the Internet as a domain for commercial expansion establish their own connections and websites. For these users, flaming and abuse are not acceptable, are not self-help remedies, and preservation of corporate reputation is paramount.[19] In Tanzania, we have Jami forums where members' post and others' comment depending on the type of the topic. Another blog called *Ze Utamu* was also shut down with the help of international law enforcing agencies, when it was found to be invading the privacy of individuals.[20]

F. The World Wide Web

The Web is now so large, and increasing in size so fast that it is impossible even to pin down estimates of its size.[21] Like newsgroups, websites can be accessed and read in multiple jurisdictions, and they therefore share many of the problems of transnational publication discussed above. But perhaps the major unique problem with the Web is how far it

[19] *Ibid*.
[20] Media Council of Tanzania (2010), State of the Media Report, Final: Layout 1 5/6/11 3:49 PM, at 37, *see also* www.mct.or.tz/.../index.php?option (last visited June 15, 2013).
[21] Scotland on Sunday, May 26, 1996. *See* www.law.ed.ac.uk (last visited April 10, 2013).

allows any individual to mimic traditional publishing at very low cost. "Home pages" can be set up which will do a good job of looking like electronic journals or glossy magazines and which can be extremely attractive, with good design and graphic content. Equally they may well unknowingly breach the law of copyright and trademark for example, the rock group Oasis's warning of their intention to crack down on unauthorized use of copyrighted material relating to the band by amateur "fan" websites (Financial Times, June 5 1997).

However, many of the parties setting up websites are often fans of popular music or TV programmers, students, pressure groups, or amateur associations who are not already traditional publishers, have no knowledge of the law of defamation or libel, and may well find themselves publishing defamatory statements without fully appreciating their potential liability.[22] For example, President of the United Republic of Tanzania, Jakaya Mrisho Kikwete, was once the victim of cyber defamation, when one of the websites named "Ze Utamu", published defamatory pictures involving him.[23]

G. Where the Publication Takes Place (Which Involve Issues of Jurisdiction)

The issue of whether the publication has occurred is not easy to define as a defamatory statement that can be published anywhere in the world where there is access to the Internet. In the context of Internet, it is not necessary for the plaintiff in all cases to prove directly that the defamatory statement was brought to the actual knowledge of anyone, some person or persons other than the plaintiff himself.[24] Publication is only established if the plaintiff makes reasonable inference that the publication was accessible in the said jurisdiction.[25] In contrast, with the Internet it is not all probable that every website will be accessed in every jurisdiction which can theoretically be accessed.[26] So as a matter of reasonable inference, it can be assumed that any site put on the Internet and accessible from anywhere is in fact accessed everywhere.[27]

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[22] *See also* the issue of www.zeutamu.blogspot.com which later on the website was banned.
[23] In the case, Ferdinand Charles Urio, a teacher at Uomboni Secondary School in Marangu, charged, alongside Daniel Robin, for publishing indecent pictures of the Head of State on the Internet. *Available at* http://bongoline.com/news/1929/JK+defamation/ruling+date=set.
[24] Sharma, V. (2010), *op. cit.*, at 308.
[25] *Ibid*.
[26] *Ibid*.
[27] Kohl, U., *Defamation on the Internet—A Duty Free Zone After All?*, 119 SYDNEY L. REV., 126-127 (2000).

In *R v. Graham Waddon*[28], the defendant submitted that, because the Internet publication had necessarily occurred abroad, therefore the instant court did not have jurisdiction. Hardy Christopher, J. held:

> *Publishing an article under s. 1(3), (b) of the 1959 Act included data stored electronically and transmitted. To transmit simply meant to send from one place to another. In the instant case, an act of publication took place when the data was transmitted by the defendant or his agent to the service provider, and the publication or transmission was in effect still taking place when the data was received. Both the sending and receiving took place within the jurisdiction of the court and it was irrelevant that the transmission may have left the jurisdiction in between the sending and receiving.*

In other words, the court exercised its jurisdiction, even when the pornographic material was held on a US based server. The court argument has been that since the material was uploaded (by Waddon) and downloaded (by the police) in the UK, it could be classified as being "published" in the UK.

Also in another case of *Joseph Gutnick vs. Dow Jones & Company Inc.*[29] Justice Hedigan held that, the "publication" of an online article occurred in the jurisdiction that the article was downloaded, regardless of where it was uploaded or where the publisher's server resided.

The aforesaid judgment has made it clear that a person is defamed at a place where publication is made, and the context of Internet, and it is the downloading of the information that is a relevant fact for identifying the jurisdiction. The criticism that the plaintiffs may resort to "forum shopping" in order to bring their claim in a jurisdiction which provides them with a greater chance of success is untenable. Before deciding any case, the courts will have to observe whether there exists a substantial connection with the place where proceedings are instituted.[30]

H. Liability for Online Defamation

This is the last aspect which to be determined. The issue of liability is another important issue to be determined on the issue of defamation. There is no doubt that, poster of defamatory comment will incur liability.[31] Another kind of liability is employer's liability, more companies make use of email as a method of communication among staffs, so there will be increasing exposure to action on the basis of vicarious liability in respect of

[28] Southwark (Crown Court, June 30, 1999).
[29] [2001] VSC 305.
[30] Sharma, V. (2010), *op. cit.*, at 306.
[31] Lloyd, I. (2008), *op. cit.*, at 574.

the use or misuse made of the communication network.[32] Also ISP, the operator of an online service, incurs liabilities in certain circumstances, however there is more controversy as to whether ISP should incur liabilities akin to those traditional publishers in respect of messages appearing on their system.[33]

III. LEGAL FRAMEWORK GOVERNING ONLINE DEFAMATION IN TANZANIA

A. The Constitution of the United Republic of Tanzania, 1977

The Constitution of the United Republic of Tanzania, 1977[34] prohibits any interference to any personal communications whether through media or not. Every person is free to communicate and to receive any information but the freedom is not absolute which is limited as whoever communicates must ensure that, he does not injure others reputation. Article 18[35] provide that:

> *Every person has the right to freedom of expression, opinion and expression, and to seek, receive and impart or disseminate information and ideas through any media regardless of national frontiers, and also has the right of freedom from interference with his communications.*

The Constitution has no any provision which address crimes that are committed online. So, it seems that online defamation is a new crime which is not yet recognized by our Constitution and other's laws. That is the reason why other people use the same Constitution provisions to hide from their crimes. The trouble with the laws currently is that, criminals know their rights more than their wrongs,[36] they can use the provision of Article 18 of the Constitution of United Republic of Tanzania which prohibits interference of an individual communication as the justification of their crimes.

B. The Newspapers Act[37]

Currently in Tanzania, the Law which deals with defamation matters is the Newspapers Act, especially PART VI of the Act, in providing the meaning of libel defamation, the Act, stated that, any person who, by print, writing, printing, effigy or by any means otherwise than solely by gestures,

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[32] Lloyd, I. (2008), *op. cit.*, at 574.
[33] www.legalservicesindia.com/articles/defcy.htm (last visited April 30, 2013).
[34] The Constitution of the United Republic of Tanzania (CAP. 2 R.E. 2002).
[35] *Ibid*.
[36] http://www.quotegarden.com/justice.html (last visited April 10, 2013).
[37] The Newspapers Act (CAP 229 R.E. 2002).

spoken words or other sounds, unlawfully publishes any defamatory matter concerning another person, with intent to defame that other person, shall be liable of the offence of defamation.[38] Looking in such definition, nothing is stated concerning online defamation.

It further provides the element of defamation, when a person is defamed required to prove that, there is a defamatory matter that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to cause damage to any person in his profession or trade by an injury to his reputation.[39]

There should also be publication.[40] A person publishes a libel if he causes the print, writing, painting, effigy or other means by which the defamatory matter is conveyed, to be dealt with, either by exhibition, reading, recitation, description, delivery or otherwise, so that the defamatory meaning thereof becomes known or is likely to become known to either the person defamed or any other person.

It is not necessary in a case of libel that the defamatory meaning should be directly or completely expressed; and it suffices if such meaning and its application to the person alleged to be defamed can be collected either from the alleged libel itself or from any extrinsic circumstance or partly from the one and partly from the other means.

C. The Electronic and Postal Communication Act, 2010[41]

The Act empowers the minister and the Tanzania Communication Regulatory Authority Act (TCRA) of 2003.[42] To Enact Regulations to regulate content related matters as provided under Section 103 of the Act. The Act also provides for establishment of code of conduct under section 104[43] which, inter alia deal with offensive materials disseminated through the Internet. The code and regulations may settle the position in Tanzania in respect of defamatory materials.

a. Be binding on all Content Service Licensees;

b. Prohibit the provision of content which is indecent, obscene, false, menacing or otherwise offensive in character.[44]

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[38] *See* Section 38.
[39] *See* Section 39.
[40] Section 40 of the Newspapers Act (CAP 229 R.E. 2002).
[41] Tanzania Communication Regulatory Authority, Act No. 3 of 2010.
[42] This is the Act which regulates all communication activities in Tanzania including broadcasting and online communications.
[43] Section 104 of the Tanzania Communication Regulatory Authority, Act No. 3 of 2010.
[44] *Ibid see* Section 104 (1).

IV. RECOMMENDATIONS WITH RESPECT TO ONLINE DEFAMATION

It has been shown that Tanzania faces challenges in combating online defamation and other related cyber crimes. The following recommendations in one way or another will help to deal with challenges to online defamation in Tanzania.

a. Since the current existing laws and regulations in Tanzania are ineffective in regulating communications through online means, therefore serious efforts should be taken to revisit and enacting laws that will sufficiently cover and address how liability should be established to users, ISPs, intermediary for online defamation.

Tanzania should enact specific law to deal with online defamation instead of incorporating such law in another law that is dealing with other matters. The enacted law should address how Internet users will be protected in online environment, and how and when the Internet users, ISPs and intermediary may face liability when they make, facilitate, transmit defamatory comment in online environment.

b. There is a need of establishing a special machinery charged with the duty of identifying the anonymous defendant in online communications. The available procedure in Tanzania is very cumbersome and raises a lot of complexity especially when the Internet used for defamatory is a public one (cybercafés), the National CERT should be introduced to the public so that the public could be aware of how this machinery could help them because the whole population doesn't know its role. Also there should be registration of the electronic devices such as laptop as it is in the phone registration; this will help in identifying the tortfeasor.

c. Tanzanian laws should be harmonized and mirror international laws that have succeeded in combating crimes in a cyber space specifically defamation such as the Europe Convention on Cybercrime, 2001.[45]

CONCLUSION

Recent developments of ICT resulted into increasing of freedom of expression, hence the growing participation in Internet chat rooms, one to one email, mailing list, social networks and online forums which are likely to cause potential occurrence for online defamation. As Internet users can easily create bogus profiles and make anonymous and unlimited defamatory postings regarding any person. Tanzania has used different legislations to deal with these challenges such as the Tanzania Communication Regulatory

[45] Budapest Convention on Cybercrime CETS No. 185.

Authority Act, EPOCA, Evidence Act, Penal Code, Newspaper Act, not limited to International Instruments such as Universal Declaration of Human Rights of 1948.

Despite the fact that, different legislations and initiatives have been taken to deal with problems posed by the Internet, still online defamation posed a great threat to Tanzania and this has been due to different practical and legal challenges in establishing liability in online defamation.

It is now safe to assume that Tanzania's laws are not exhaustive enough to cover the challenges brought by ICT revolution especially on holding Internet user, ISPs, hackers and intermediary liable for defamatory statements occurring through online.

AN OBSERVATION OF THE RUSSIAN POLITICAL HISTORY IN THE 20TH CENTURY: A NON-IDEOLOGICAL SYSTEM OF INTERPRETATION

Zhu Jianli[*]

Most of the foreign observers used to study Russia in the 20th century from the ideological point of view, praising or hating, no matter how they (claim) try to be non-ideological. But there is a big historical assumption: with or without ideology, would Russia have had a totally different path of development, or is there a unique path only for Russia? What are the problems of Russia had to face and what is the right thing to make historical justice? These questions become more and more urgent especially after the collapse of the Soviet Union when observers lost their ideological coordinate. This article tries to look "inside" Russia and find out whether there is a historical discipline of the Russian path.

INTRODUCTION

Country reconstruction is the precondition of shaping a modern country. A rationally reorganized state power and a rational allocation of social benefits are crucial in this process. In this regard, Russia had a heavy historical burden and the burden still exists, displaying a karma circle of "chaos—a centralized state power—the death of initiative and the loss of room for development—liberalism and nihilism—chaos".

This paper discusses the Russian political history in the 20th century as an intact karma circle, and observes the historical discipline in it, and the author attempts to break the old routine, and interprets the key factors at some historic points, indicating that the role of ideology is not as significant as what we had thought.

In some way, the process of human civilization means "Trial and error". We can scientific safely and political correctly accuse many historical periods, making attempt to "reset" them, but with our rationality we all know that in a linear time, we can never change what had happened. All we

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can do is to make things right next time, and this is the basic significance for the man who studies history.

During the Russian political history process in the 20th century, the dramatic "Trial and error", with both of its universal and national characters, is very rare in human history, which makes the process a good object to be observed.

The core of the Russian political "Trial and error" is the question of whether there is some historical discipline of the Russian path. My answer is yes: State is the major driving force of Russia political process and it plays the decisive role. Actually, Russian history, as the great Russian historian Vasily Osibovich Kliuchevsky (1841-1911) says, is in some way a process of "Государство пухло, а народ хирел" (The state swelled and the people shrank). The 20th century is not an exception.

It is known that at the beginning of the 20th century, major changes have occurred in the Russian social structure, with capitalism developing and "obshina", the basic social unit being on the wane. Consequently, the structure of traditional political power was forced to change as well: the imperial power, which used to be an unlimited one, became a limited power, while at the same time, legal or illegal parties and organizations began to show their existence inside and outside the government, sharing the power and making it a multiple one. All signs seemed to indicate that the state as the major driving force was giving way to the people, to "democracy and freedom", that the process of "The state swelled and the people shrank" would not happen again.

But this was a false appearance. After the February Revolution in 1917, when the Provisional Government faced the urgent mission of the state reconstruction and a strong and efficient power was badly needed, it failed in deciding which is more important, a strong and efficient power (efficiency) or "democracy and freedom" (which sometimes mean "weak" in Russian culture): Theoretically, efficiency should have won the priority over "democracy and freedom" at this moment, but the Provisional Government seemed to be not prepared for it and continued to be "weak", without actions to reunite and reconstruct the country, and not surprisingly, they lost the power.

Many of historians today greet the tragic and heroized "democracy and freedom", while others accuse the talkative intellectuals ("the beards") of ruining old Russia with inefficiency and weakness. Actually, the conflict between efficiency and "democracy and freedom" never ends. The soviet administration, the successor of the old power, knew well about the basic demands in the state reconstruction (in fact, the state reconstruction became

a national policy). This time efficiency won the priority, and it was thought as must be conducted by the state. State was thought to be safe and reliable, while all the other organs and individuals were under strong suspicion. This simple and understandable political formula was in active action.

The awkwardness of "NEP" is a good example of the formula: when the "nepmen" became rich and greedy, they suffered opposition from both the administration and the people. Under the political slogans of "capitalists" and "kulak" etc., there lied the old and deep-rooted suspicion and fear of losing power. The feelings were of course natural for the administration; and for the people, believing in the myth of the "good tsar", who used to be their protector, and "the bad bureaucrats and parasites", who were thought to be the source of all their suffering in the world, they were natural or true, either.

The great paradox was, when the state seized almost all the power and became the exclusive employer and tried to make miracles of development, abandoning the lever of unemployment and the means of stimulating substances, it found himself in great trouble: the expected efficiency didn't come.

In the end of 1920s and in the 1930s, many of the arrests and trials, far from political persecute, were cover of the simple fact of mismanagement and at the same time, tried to fix the problems. Ironically, the overthrown unitary power system was recalled, and the more ironical thing was that it really helped the administration from bankrupting and even made some success, which in turn stimulated the confidence of the administration and promoted the dependence on the power of state in every field.

What are the major factors of the unitary power in Russia? They are terror and punishment, used for centuries on this land. In Russia, historical progress is always accompanied by great cost, even loss, especially humanistic loss, which is exactly the consequence of terror and punishment. Peter the Great conquered the Russian savage with his savage, killing thousands of people. He was even blamed as the "antichrist" by his contemporaries and later generations. But there are other comments on him, and one of the most famous is that he is the first "westerner" in Russia, introducing the progressive culture and system and ideas to the "uncivilized" Russian people at that time. And it is also in this sense Nicolas Berdyaev claimed that Peter was the "first Bolshevik" of Russia. Actually, the Bolsheviks are the logical heir of Peter the Great in state construction, and are the practitioners of the westerners' ideas of the 19th century, building a modern economic system and ideology.

And here comes the most difficult problem: how can we evaluate the "terror and punishment", the detailed forms of which were "the great pure" and the "GULAG" system? Part of the historians today tends to make the judgment that they were antihuman crimes; others would try to explain them as "collateral damages" in state construction. Maybe these evaluations are both true in some way. As for me, the author would rather regard the "terror and punishment" as a living example of Hegel's history formula "evil is the driving force of history". And I believe that today we must find out ways to avoid this kind of evil.

Efficiency with terror and punishment, which was the strange scene from the 1920s to the 1950s. In fact, time passing and we can more and more clearly to say that the system of "terror and punishment" helped the realization of efficiency only in a very short time, with great cost and more structural contradictions and people getting exhausted. Positive results of efficiency were neutralized by passive results of terror and punishment.

Did the soviet leaders realize the problem? Of course they did, and after the mission of state reconstruction finished (basically), they started to solve the problem. From the 1950s to 1980s, from Stalin to Gorbachev, all of the soviet leaders tried to find a way out, but never found. Why?

There are many versions of explanation, and my explanation is that their methodology was wrong and they were deep into the "path dependence", that is the dependence on using coercive force of the state in every solution: Khrushev's "ottepel" replaced the old "terror and punishment" system with "executive order" system, lightening the harshness of power using; Gorbachev's "perestroika" and "glasnost" went further, but we must point out at once that all of these reforms are led by the state power. Can the right hand of the state beat the left hand, or conversely, the left hand beat the right hand? Can the state power oppose itself?

My answer is that although it was very hard and it would lead to some logical conflicts, the soviet administration did have a time to free itself from the "path dependence". It was the "Brezhnev era". The Kosygin reform was a good start; however, the repression of dissentients unexpectedly made the administration the only force which could carry out the reforms. So they repeated Khrushev in using the state power, actually, they just abused the power and time.

Here I will firstly introduce an interesting phenomenon in our daily life: the riverbed of the Yellow River (Mother River of China, about 5,464 kilometers long) is higher than some other cities flowed by, which were protected by embankments, and these parts of river are called the "perched river". My theory is: time is passing and the riverbeds become higher, and

the embankments are accordingly built higher. So the cost for the safety of the "perched river" is also getting expensive, and at the same time the potential damage is increasing. That is "perched river crisis". In the "Brezhnev era", "perched river crisis" was very serious when the administration lost its sensibility of crisis, and what made things even worse is the declaration of "developed socialism", which commanded great fanfare in the early 1970s and blocked the path to reform.

The state lost his best chance in reform and development and paid for it by losing the power during the last 15 years of the 20th century. Increasing nihilism throughout Russia repeated what happened in the beginning of the 20th century, and both the state and the people suffered more than benefited from the multiple power.

One of the most impressive things after the collapse of Soviet Union is that although Russia abandoned its ideological way of development and became a so-called "democratic and free" country, the restoration of political order was still in a "soviet", actually Russian way: a "powerful" political leader (Putin) came into power and punished the "bad bureaucrats". As a matter of fact, again ironically, the overthrown unitary power system is recalled, and Ivan the Terrible, Peter the Great and Stalin's tough policies, which mean "state wins the priority", meet with public recognition! State power wins again and the History repeats itself (История повторяется)!

CONCLUSION

Now we come to the conclusion. For almost all the human societies, big or small, political power and the political power structure are of great importance and often play decisive roles in their development. In the example of Russia, the highly centralized state with unlimited or rarely limited power is a unique existence: it overrides all the other organs of the society and forces them to obey. Within this unitary political system, only the state has the possibility and feasibility in leading the development. So we can't agree with those ideological interpretations of Russian history in the 20th century, in fact, we believe that the real name of the so-called "Soviet mode of power" should be "Russian mode of power", and "Soviet mode of development" should be "Russian mode of development".

Can the Russians avoid the destiny of Russian mode "The state swelled and the people shrank"? Can they break the karma circle of "chaos—a centralized state power—the death of initiative and the loss of room for development—liberalism and nihilism—chaos"? These questions are to be discussed in future.

US-CHINA LAW REVIEW
VOLUME 11, NUMBER 3, MARCH 2014

David Publishing Company
240 Nagle Avenue #15C, New York, NY 10034, USA
Tel: 1-323-984-7526, 323-410-1082; Fax: 1-323-984-7374, 323-908-0457
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ISSN 1548-6605
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9 771548 660148